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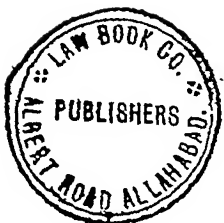
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duty owing to B he may bargain with B for a release (z), or perhaps for an extension of time (a), or he may even fail to perform, and submit to the consequences (b). The loss of these several powers is clearly a detriment. And if to any extent it is a detriment the law will not inquire into its adequacy. Performance, therefore, must be a good consideration. And if performance is a good consideration

(z) Corbin, Pre-existing Duty as Consideration, 27 Yale Law Journal 362, dealing with the example of A's performance of his duty to B by way of acceptance of an offer of a promise by C, thus explains the detriment to A: "There is another valuable power possessed by A that is effectively extinguished by this full performance of the acts required by his duty to B, one that he is legally privileged to exercise. That is the power to offer a rescission to B. This is not a power to rescind: neither party to the contract has such a power. It is the power to create in B the power to rescind by accepting A's offer of rescission".

(a) *Abbott v Doane*, cit p 120, *ante*

(b) *Scotson v Pegg*, cit. p 119, *ante*

It might, indeed, be suggested that in such cases there should be some evidence that before receiving C's promise A did not intend to perform his duty to B or intended to seek a release or an extension of time. Byles, J. (dissenting), in *Shadwell v Shadwell* (1860), 9 C. B. (N.S.) 159, 178; 142 E. R. 62, 66; Williston, 8 Harv. L. R. 36—37. A like objection where the promise could be regarded as from C to A and B, and not from C to A only, was conclusively answered by Cardozo, J., in *De Cicco v Schweizer* (1917), 221 N. Y. 431. The learned Judge expressly put aside the case of a promise from C to A only, for that case was not before the Court; but his reasoning seems equally cogent in such a case. He said: "But where the promise is held out as an inducement to both parties alike there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result."

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment. *Smith v Chadwick*, 9 App. Cas. 187, 196 . . . "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement". Blackburn, L.J., in *Smith v Chadwick*, *supra*. The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others". See also to the same effect the judgment of Holmes, C.J., in *Martin v Meles* (1901), 179 Mass. 114.

to say that the marriage was to be regarded as a detriment to the plaintiff and could be considered an advantage to the uncle.

The next case is *Scotson v. Pegg* (g). There the declaration stated that in consideration that the plaintiff would deliver to the defendant a cargo of coals then on board the plaintiff's ship the defendant promised to unload the cargo at the rate of forty-nine tons per working day; and the action was brought for breach of this promise. The defence was that there was no consideration for the promise, inasmuch as the plaintiffs were already bound by a contract with a third party to deliver the coals to that party or his order and he had given his order in favour of the defendant. This, however, was held by the Court of Exchequer (Martin and Wilde, BB.) to be no answer to the action. The point raised by the defence was fairly met by Wilde, B. (h), who concluded his judgment thus: "I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons".

The latest reported English case in which the question was directly involved was *Chichester and Wife v. Cobb* (i), decided by the Queen's Bench (Blackburn and Shee, JJ.) in 1866. There it was alleged in the declaration that the plaintiffs had agreed to marry and in consideration thereof the defendant promised the female plaintiff that "so soon as all pecuniary and necessary arrangements should be made to constitute a legal marriage, as proposed" he would be prepared to pay over on her behalf a sum of money. The Court held that the declaration showed an absolute promise based on adequate consideration.

Illusory Consideration—Summons. It would seem, therefore, that a consideration is not illusory and inoperative merely because it consists in nothing more than the promise or performance of an act which is already obligatory towards a third party. Presumably,

(g) (1861), 6 H. & N. 295; 158 E. R. 121.

(h) It might perhaps be said that Martin, B., evaded it.

(i) 14 L. T. 433.

THE LAW OF CONTRACTS

have been also a legal obligation were it not for some special protection afforded by the law to the particular person who is subject to it. In such cases he upon whom such an obligation lies may waive the legal defence so available to him by expressly promising to perform the obligation. Such a promise is enforceable against him as a binding contract supported by the consideration of the precedent obligation (z).

This rule is illustrated by the following examples of its application, some of which are still recognised by modern law, though others have been abolished by recent legislation.

1. Until the enactment of the Limitation Act, 1939, a debt barred by the Statute of Limitations was, on one view, a good consideration for a subsequent promise to pay it (a). By Lord Tenterden's Act (b), however, it was necessary that such a promise should be made in writing. The matter is now dealt with in the Limitation Act, 1939, in such a way as not to raise any question as to consideration (c).

2. A debt incurred during minority under a contract voidable because of minority was formerly a good consideration for a promise made after majority to pay it. By Lord Tenterden's Act it was provided that such a promise must be in writing, and by the Infants Relief Act, 1874, the rule in question was wholly abolished. It is provided that "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy".

3. A debt barred by the bankruptcy of the debtor was formerly a good consideration for a subsequent promise to pay it (d). By the modern Bankruptcy Acts this rule has been abolished (e).

In addition to cases falling within the principle so illustrated there are other cases in which, by reason of ancient decisions or judicial *dicta*, it is possible that a precedent moral obligation may still amount to a good consideration. It is sometimes said, for example, on the authority of such cases as *Lampleigh v. Braithwait* (f) that services rendered by one man to another at his request constitute a sufficient consideration for a subsequent promise to pay

(z) See the note to *Wrennall v. Adney* (1802), 3 B. & P. 247; 127 E. R. 137.

(a) As to whether the action was not to be regarded as founded on the original contract, however, see Lord Sumner's judgment in *Spencer v. Hemmerde*, [1922] 2 A. C., at pp. 519-536.

(b) 9 Geo. 4, c. 14, s. 1.

(c) See p. 612, *post*.

(d) *Kirkpatrick v. Tattersall* (1845), 13 M. & W. 766; 153 E. R. 321.

(e) *Heather v. Webb* (1876), 2 C. P. D. 1; Bankruptcy Act 1914, s. 28.

(f) (1615), Hobart 105; 80 E. R. 255; 1 Smith's Rep. 148.

Sir John Salmond's uncompleted work on Contract, edited and with additional chapters by Dr. P. H. Winfield, was first published in 1927 under the title Principles of the Law of Contracts by the late Sir John Salmond and Percy H. Winfield.

tory kind of provision may be taken section 174 of the Public Health Act, 1875, enacting that "Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority."

Where such a statutory provision is permissive, and a contract has been made which is not under seal nor yet within the statutory provision, but in respect of which a non-statutory exception would apart from the statute apply, the statute will not exclude the non-statutory exception, which will be available accordingly (i).

Where the statutory provision is mandatory, however, it would seem that in general the non-statutory exceptions will be excluded. Thus in *Young v. Leamington Spa Corporation* (k) the House of Lords held that a person who, pursuant to an unsealed contract with a corporation, had rendered services to the corporation of a kind necessary for the purposes for which the corporation was created nevertheless could not recover anything from the corporation in respect of those services. It may perhaps be doubted whether, in the absence of express words in the statute, a similar rule would be applied against a corporation which had performed its side of the contract and then sued the other party. In the absence of such express words the view which should be taken would appear to be that the requirement of sealing is for the protection of the corporation and the incorporators, not for the protection of the other contracting party.

§ 51. Instrument Exclusive and Conclusive Evidence of the Contract

Such being the nature of a written contract, we proceed to the consideration of a fundamental legal principle which applies to all such contracts, and distinguishes them from all others (l). This principle may be thus formulated: In the case of a contract in writing the written instrument is exclusive and conclusive evidence of the terms of the contract. It is exclusive evidence, and therefore no other and substituted evidence is admissible as

(i) *Wilson v. West Hartlepool Ry.* (1865), 2 De G. J. & S. 475, 496. The statutory relaxation of the common law rule may, indeed, be so wide that there could be no need to invoke any of the non-statutory exceptions. See, e.g., s. 29, Companies Act, 1929, mentioned p. 163, *post*.

(k) (1883), 8 App. Cas. 517.

(l) "We are of opinion that the rule relied on by the plaintiffs [i.e., the fundamental legal principle referred to above] only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement": Pollock, C.B., in *Harris v. Rickett* (1859), 4 H. & N. 1, 7; 157 E. R. 734, 737.

PRINCIPLES OF THE LAW OF CONTRACTS

BY

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AND

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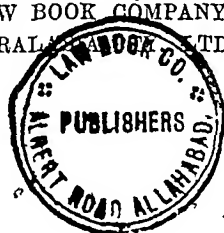
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this sense is regarded as an essential condition of invalidity in addition to actual inducement, it is thought that there is no authentic doctrine to this effect. In a case of fraud in which error and inducement are actually intended and actually produced there is no reason why the fraudulent party should be entitled to avoid rescission on the plea that his misrepresentation was not in itself material and likely to induce the contract. He has succeeded in his fraud and should be held responsible for it. Even in a case of innocent misrepresentation, if the representor knows that although *per se* immaterial it is in fact relied on by the representee as an inducing cause of the contract there seems no reason why it should not invalidate the contract. But from the merely evidential point of view the materiality of a representation is doubtless an important element (x). If it is material, this may be a good ground for the inference of fact that it did in truth induce the contract, and for the further inference that it was intended to do so, or that, at all events, the representee was entitled to assume that it was held out to him for that purpose. If, on the contrary, a representation is in itself immaterial, evidence is required that it did in fact induce the contract, and that it was intended to do so, or that the circumstances were such as to justify the representee in accepting it as so intended.

§ 98. Misrepresentation by a Stranger to a Contract

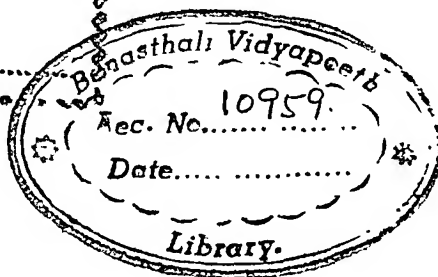
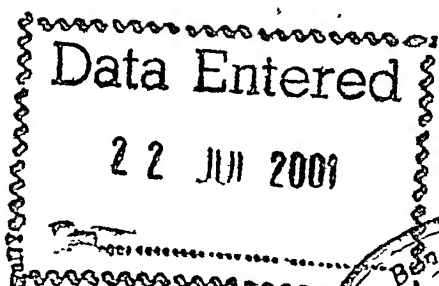
A misrepresentation, whether fraudulent or innocent, must be made either by the other party to the contract or by his agent, and not by a stranger (y). If the contract is made by an agent, the misrepresentations of the agent have the same invalidating effect as if made by the principal himself. On principle it can make no difference, so far as mere invalidation is concerned, whether the agent in making such a representation was or was not authorised to do so, or did or did not act within the scope of his general authority. No man should be allowed to enforce a contract which has been procured by the misrepresentations of his agent by whom the contract was made, whether they were fraudulent or innocent, authorised or unauthorised (z).

(x) *Mathias v. Yettis* (1882), 46 L. T. at pp. 502, 504.

(y) *Karberg's Case*, [1892] 3 Ch. 1, 13.

(z) See Lord Westbury, L.C., *New Brunswick Ry. v. Gonybeare* (1862), 9 H. L. Cas. 711, 726; 11 E. R. 907, 913; Bramwell, B., in *Weir v. Bell* (1878), 3 Ex. D. 238, 245: "Every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he

TO THE MEMORY OF THE HONOURABLE
HENRY HUBERT OSTLER,
KNIGHT,
LATELY A JUDGE OF THE SUPREME COURT
AND OF THE COURT OF APPEAL
OF NEW ZEALAND



to the defrauded party in execution of that contract. If a contract for the purchase and sale of land is induced by the fraud of either party, the other party is entitled not merely to repudiate the contract before completion, but even to repudiate the completed conveyance. If the vendor is the party deceived he can require a reconveyance of the land on returning the purchase-money; and, similarly, if the purchaser is the party deceived he can require the vendor to accept a reconveyance and to return the purchase-money. And so also in the case of a lease granted or accepted.

This, however, was a rule of equity, and not a rule of common law. The judicial procedure of the Courts of common law included no provision for enforcing the reconveyance of estates or interests in land when they had once vested, even in a person who had acquired them by fraud. Nor did the common law recognise any rule whereby, on the rescission of a contract for fraud, such an estate or interest acquired thereunder reverted automatically in the former owner. For such a remedy it was necessary to have recourse to the Court of Chancery. Thus, in *Feret v. Hill* (d), X obtained from Y by fraud the execution of a lease of land. Y thereafter rescinded the contract and retook possession of the land, and X sued in ejectment for the recovery of it. It was held that Y had no defence to the action. The legal estate of leasehold was vested in X, and could not return to Y by the mere rescission of the contract under which the lease had been granted. The remedy of the lessor in such a case must, as the Court indicated, be sought in equity and not at common law.

Even at common law, however, it is otherwise in the case of a mere chattel, as opposed to legal estates and interests in land. When the ownership of goods passes to the purchaser under a contract induced by the fraud of the vendor, the rescission of that contract not only puts an end to the contract, but reverts in the vendor the ownership of the goods, or at least a right to retake possession of them; and this right is a sufficient ground for an action of trover at common law. Although he who was induced by fraud to convey a title to his land could not on rescinding the contract sue for the recovery of his land in ejectment, but must go into equity, yet he who had similarly parted with his title to a chattel could sue in trover at common law, and it was needless for him to have recourse to Chancery (e). In *Clough v. London and*

(d) (1854), 15 C. B. 207; 139 E. R. 400.

(e) *Re Eastgate*, [1905] 1 K. B. 465.

PREFACE

For some time before Sir John Salmond died in 1924 he had been working on a book on the law of contract. Unhappily this book was far from complete at his death. In the first place there were some topics upon which Sir John had written nothing at all. Secondly no part of what Sir John had written was in its final form. Much, indeed, was merely a first draft. It is not even clear that the order in which the chapters were arranged in the manuscript was in any way final, for the manuscript shows that Sir John had several times altered the order as the work progressed.

The task of preparing Sir John Salmond's incomplete work for publication was entrusted to Dr. P. H. Winfield. Dr. Winfield, in addition to editing Sir John's text, wrote two complete chapters and a number of sections for the book which, thus completed, was published in 1927 under the title of *Principles of the Law of Contracts* by Sir John Salmond and Percy H. Winfield. Dr. Winfield meticulously marked off his own contributions by enclosing them in square brackets, thereby enabling readers to see the state of the text as Sir John left it. In thus preserving Sir John's text in the form in which it was at its author's death, Dr. Winfield placed legal scholars greatly in his debt.

When, some years later, a further edition of the book was contemplated, Dr. Winfield found himself precluded by his own literary commitments from undertaking its preparation, and Mr. Ll. K. Wilson, of the New Zealand bar, and I were invited to prepare the new edition. Almost immediately afterwards, however, Mr. Wilson retired from professional practice and the preparation of the present edition fell to me alone. Much the greater part of this preparation had been completed at the outbreak of war, and practically the whole was finished very shortly after, but by reason of war-time conditions publication could not be proceeded with until recently.

The unfinished condition of Sir John Salmond's text seemed both to demand and to excuse the use of a free hand in

more promisees may be entitled jointly, as between themselves they may be entitled to several interests in the proceeds of the promise (*x*).

Where two or more co-promisees are severally entitled *inter se* and one has received more than his share he can be compelled by the others to pay or account to them for the excess (*y*).

C. Construction of Promises by Two or More Promisors or to Two or More Promisees

Whether in any particular case promises are several, joint, or joint and several is a question of the express or implied intention of the parties to be gathered in the case of unwritten contracts from their words and conduct in the light of all the circumstances (*z*), and in the case of written contracts from the instrument itself construed in the light of such extrinsic evidence (if any) as may be properly admissible to explain it (*a*).

Where two or more persons are simply named as promisors or promisees they will be joint promisors (*b*) or promisees (*c*) unless there are words or circumstances which require a different interpretation. " 'If two covenant generally *for themselves*, without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created; which shows the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts ' " (*d*). In the case of co-promisors under a written instrument which does not merely show them as combining in a single promise without words indicating a several liability, but in addition contains other words which make this interpretation of their liability a matter of ambiguity, regard may be had to the fact of the promisors having contracted in reference to a proprietary interest held by them and their liability treated as joint or several according to the nature of the interest (*e*). On the other hand, in the case of co-promisees who have become such in reference to a proprietary interest held by them, the nature of this interest will determine whether they are joint or several promisees even where there is no ambiguity in the contract and to treat them as joint or several promisees as the case may be is directly opposed to the

(*x*) *Re Jackson* (1887), 36 Ch. D. 732.

(*y*) *Beer v. Beer* (1852), 12 C. B. 60; 133 E. R. 823.

(*z*) *Gibson v. Lupton* (1832), 9 Bing. 297; 131 E. R. 626.

(*a*) Cf. *White v. Tyndall* (1888), 13 App. Cas. 263.

(*b*) E.g., *Other v. Iveson* (1855), 3 Drew. 177; 61 E. R. 870.

(*c*) E.g., *Hoggins v. Gordon* (1842), 3 Q. B. 466; 114 E. R. 586.

(*d*) Lord Halsbury, L.C., quoting Platt on Covenants in *White v. Tyndall*, *supra*, at p. 269.

(*e*) *White v. Tyndall*, per Lord Herschell, 276.

revision; and I have felt the freer in this regard because in Dr. Winfield's edition those who wish may resort to the work as Sir John Salmond left it. Sir John himself anticipated, shortly before his death, that he would have to spend much more time to complete the work than he had then devoted to its composition; and there is no doubt that he intended drastically to revise much of what he had written. Although I have therefore not shrunk from thoroughly revising Sir John's text I have endeavoured (with two principal exceptions hereafter mentioned) in so doing to retain everything which was characteristically Sir John's, and much the greater part of the changes that I have made in the original text itself consists in rearrangements of Sir John's own material or the elaboration of points of novelty or importance which were but briefly or obscurely made in the original text. As well I have interpolated with Sir John's text or added as footnotes thereto a large amount of new material. Such additions are especially considerable in Chapters I, X, XIV, and XXII and are not inconsiderable in several other chapters. In addition I have written the whole or nearly the whole of each of Chapters IV, V, VI, VIII, IX, XIII, XV, XVII, XIX, XXIII and XXIV.

Another alteration which I have made is to divide the work into parts, each introduced by a brief note indicating the main topics to be discussed in that part.

I considered anxiously whether to retain Sir John Salmond's chapters on contracts running with property, and conflict of laws in relation to contracts (Chapters XVI and XIX of Salmond and Winfield), and finally decided to omit both; the former because the subject is more appropriately discussed in works on the law of property, and the latter because it dealt with matters more conveniently and nowadays more usually treated in works on the general topic of conflict of laws.

In seeking for judicial authorities I have not confined myself entirely to the English law reports, but have sometimes cited decisions from other common law jurisdictions, principally Australian and New Zealand. I have generally done this where the particular decision dealt with a topic not

The decision related to a case in which the agent did not profess to act for any principal at all, but made the contract professedly on his own account. Presumably, however, the same rule would apply even to a case in which the agent, being without authority, professes to contract, not for himself, but for some unnamed principal whose identity is undisclosed. Probably such a contract cannot be ratified even on proof that the actual, though unexpressed, intention of the agent was to contract on behalf of the person who so ratifies. It is not necessary, indeed, that the principal should be actually named, but he must be in some manner identified by the declaration or acts of the agent at the time when the contract is made. A contract, for example, expressly made, though without precedent authority, on behalf of "the owner" of certain property could doubtless be ratified by him who was the owner of it at the date of the contract. But a contract expressly made by a person "as agent" without any identification of the principal could not be ratified by anyone. Conversely, if an agent professes to contract on behalf of a named or identified principal, though without authority, this contract may be ratified and adopted by that principal, even though in truth the agent had no real intention of contracting on his behalf, but was engaged in a fraudulent pretence on his own account (e).

(2) Contractual Capacity of Principal at Time of Contract.

In the second place a contract cannot be ratified by a principal who was not himself capable of making that contract *in propria persona* at the time when it was made on his behalf by the agent. Authority subsequent is not operative in a case in which even authority precedent would have been insufficient. If, therefore, at the date when the contract was made the principal was under some form of contractual incapacity, such as that which, in general, attaches to minority, he cannot subsequently ratify the contract, even though he is of full contractual capacity at the date of ratification. He could not have made the contract himself, or have authorised any agent to make it for him, and therefore his subsequent confirmation is incapable of that retrospective operation which is the essence of ratification.

This rule is of considerable practical importance in respect of the contracts which are so commonly made by the promoters of a company on behalf of that company before its actual incorporation—

(e) *Re Tiedemann*, [1899] 2 Q. B. 66.

adequately considered in any English authority known to me, or (more rarely) where there was to be found in that decision an especially clear or attractive statement of the law on the particular topic.

None of Dr. Winfield's contributions to the text of Salmond and Winfield appears in the present work. Dr. Winfield had expressed to the publishers his reluctance to have his contributions touched by another hand, and with this view the present writer thoroughly sympathised. Students seeking another treatment of the topics of capacity of parties and judicial remedies may, however, be reminded of Dr. Winfield's valuable chapters on these matters in Salmond and Winfield.

I am indebted to my friends for various forms of assistance in preparing the present work. Sir Hubert Ostler, lately a Judge of the Supreme Court of New Zealand, read the whole of the manuscript and offered me much valuable comment. My colleagues on the Faculty of Law at Victoria University College (where practically the whole of my part of the work was composed) were helpful to me in many ways; in particular Mr. I. D. Campbell, LL.M., Lecturer in English and New Zealand Law, was most generous of his time and gave me the benefit of an acute criticism of many parts of the work. I also received a number of valuable suggestions from Mr. S. A. Wiren of the New Zealand bar. And although I was deprived of Mr. Ll. K. Wilson's active collaboration I had the advantage of much discussion with him, especially in regard to the earlier chapters. Mr. J. D. Holmes, B.A., LL.B., of the bar of New South Wales, despite heavy professional demands on his time, assisted me in preparing the general index.

J. W.

SYDNEY, N.S.W.

January, 1945.

been created between his principal and the third person. The agent is not commonly a party to that contract, and commonly acquires neither rights nor liabilities under it.

Nevertheless it is otherwise in special cases. An agent may, if he so pleases, contract in such terms as to make himself a party to the contract. He may contract, as it is said, *personally*, and not merely in his capacity as an agent; and where he does so, he can both sue and be sued upon the contract to which he has so made himself a party.

Where the contract is made orally, it is a question of fact whether, according to the true intent of the agent and the third person, the agent is himself a party to the contract, or whether it exists exclusively between the third person and the principal. Where, on the other hand, the contract is made in writing, this question depends on the conclusive operation of the words of the written instrument as interpreted by the Court. If on the true interpretation of that instrument the agent is himself a party to the contract no extrinsic evidence is admissible to prove a contrary intention.

"The general rule", it is said by Blackburn, J., in *Fisher v. Marsh (p)*, "is, that where an agent makes a contract, naming his principal, the contract is made with the principal and not with the agent. But even where the principal is known, a contract in writing may be made by an agent with a third person, in such terms that he is personally bound to the fulfilment of it; as if he says, 'I for my own self contract', in such a case there is a personal contract by the agent, and he may sue or be sued on it, although the principal may interfere and claim the benefit of it."

When an agent thus contracts personally he may do so either concurrently with his principal or to the exclusion of his principal. That is to say, he may either make both himself and his principal parties to the contract, or he may leave out his principal altogether and contract exclusively for himself. In the first case, either the principal or the agent may sue or be sued upon the contract, for both of them are parties to it. In the second case, the agent alone can sue or be sued, for the principal has not been made a party to the contract. The first case is that which usually exists when an agent contracts personally. He usually adds himself as a party without excluding his principal. But in special cases the agent is *substituted* for the principal—as in the case of negotiable instruments in the agent's own name, or in the case of any contract in which

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through whose instrumentality those contractual obligations are to be vicariously performed, but they remain, notwithstanding such delegation of performance, the obligations in law of the assignor himself and of no one else. When a builder assigns his building contract to a successor in business he effectually authorises and empowers the assignee to perform the contract in his stead (y); and vicarious performance by this substitute has in law the same effect as performance by the assignor himself, and amounts accordingly to the fulfilment of the condition on which the contractual right of payment depends. But the assignment does not effectually transfer from the assignor to the assignee the legal liability for non-performance of the obligations of the contract. If the house is not built, or is built improperly, the owner's right of action will be against the assignor and not against the assignee. But if it is duly built by the assignee it will be the assignee, and not the assignor, who will be entitled to recover the price of it from the owner.

Here also we have to draw the same distinction between personal and impersonal obligations that has been already adverted to in respect to the assignment of contractual rights. It is not every contract that thus admits of delegated and vicarious performance by an assignee. When the obligations of the assignor are personal in their nature no such assignment both of the benefit and of the burden of the contract is possible (z). The most that the assignor can do is to substitute the assignee for himself in respect of his rights under the contract; he cannot substitute him in respect of his obligations so as to make performance by the assignee equivalent to performance by himself. Where, on the other hand, the obligations of the assignor are impersonal, in the sense that it makes no material difference to the other party to the contract whether he receives performance from the person with whom he contracted or from a substitute appointed in his place, then the contract is assignable both in respect of the benefit and in respect of the burden of it (a). Thus, if an artist contracts to paint a picture for £1,000 he cannot assign both the benefit and the burden of the contract so as to substitute another person for himself both to paint the picture and to receive the price. In such a case he can assign his contractual right only—his right to receive the price—but he must retain for himself the burden of his contract and paint the picture *in propria*

(y) Cf. *Knight v. Burgess* (1864), 33 L. J. Ch. 727.

(z) *Robson v. Drummond* (1831), 2 B. & Ad. 303; 109 E. R. 1156.

(a) *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149; *Tolhurst's Case*, 2 K. B. 660, 669; [1903] A. C. 414, 417.

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ever, at an early date departed from the principles of the common law in this matter, and recognised as valid the assignment of choses in action. Such assignments, being recognised only in the Court of Chancery and not in the Courts of common law, were necessarily equitable merely. They vested the equitable ownership in the assignee, but left the legal ownership in the assignor. How, then, did the assignee enforce the equitable title thus vested in him? He could not sue for the debt or other chose in action in the Courts of common law, for those Courts refused to recognise his title and knew nothing of equitable ownership as a ground of suit. Nor in general could he sue for the same purpose in the Court of Chancery, for that Court, although it would recognise his title, did not commonly exercise jurisdiction to enforce the payment of debts or pecuniary claims arising *ex contractu* (*l*). It was necessary, therefore, for the Court of Chancery to devise a middle way for the protection of equitable assignees of choses in action. It imposed upon the assignor the duty of allowing his name to be used by the assignee in the Courts of common law in an action for the enforcement of the contract (*l*). "An equitable interest", said Lord Eldon in *Wood v. Griffith* (*m*), "under a contract of purchase, may be the subject of sale. A person claiming under that contract becomes in equity a trustee for the persons with whom he afterwards contracts . . . and a Court of equity not only allows, but actually compels, him to permit them to use his name in all proceedings for obtaining the benefit of their contract." The practical effect of an equitable assignment was, therefore, that the assignee, though only an equitable owner, was entitled to sue for the chose in action in the Courts of common law in the name of the assignor as plaintiff, nominally on behalf of the assignor as the legal owner of the chose in action, but in reality on his own behalf in pursuance of his equitable title.

In one notable instance, indeed, the common law itself relaxed its rule against the assignability of contractual rights. It did this by borrowing from the law merchant the rules as to negotiable instruments (*n*). An instrument may be described as negotiable when by the custom of merchants or by statute it is transferable like cash by delivery and capable of being sued upon by the holder

(*k*) *Hammond v. Messenger* (1838), 9 Sim. 327; 59 E. R. 383.

(*l*) *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, 380.

(*m*) (1818), 1 Swanst. 43, 55-56; 36 E. R. 291, 296.

(*n*) In regard to bills of exchange, cheques and promissory notes these rules are now codified in the Bills of Exchange Act, 1882.

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£100 out of the sum so owing. "A mere charge on a fund or debt operates as a partial equitable assignment" (y).

May Relate to Future Choses in Action. A valid equitable assignment may be made of *future* choses in action—of contractual and other rights which have not yet come into existence: as in the case of an assignment of future book debts (z). So soon as the debts or other choses in action so assigned by way of anticipation come into existence the equitable ownership of them passes automatically to the assignee. In the meantime the assignment has necessarily no immediate operation as such, for there is no present subject-matter upon which it can take effect. It operates presently in equity, however, as if it were a contract to assign those choses in action when and as they come into existence. For this reason an assignment of future choses in action is inoperative in equity unless supported, like other contracts, by valuable consideration (a).

Notice of Assignment. An equitable assignment is a transaction between the assignor and the assignee, not between the assignor and the debtor or trustee. In order to be valid and operative between assignor and assignee it is not necessary that any notice of it should be given to the debtor or trustee. Much less is it necessary that the debtor or trustee should consent to the assignment. In practice, however, it is highly desirable that such notice should be given, for in its absence the title of the equitable assignee of a chose in action is precarious in two respects.

In the first place, the debtor or trustee is entitled, until and unless he receives notice of an assignment, to assume that the assignor still remains the owner of the chose in action, and to deal with him on that basis. If, therefore, the debtor or trustee, not having received notice, pays the debt or transfers the trust fund to the assignor, or enters into any transaction whereby he acquires, as by set-off or otherwise, any defence to a claim against him by the assignor, the assignee will be bound by such payment, and will be subject to the like defence in any attempt made by him to enforce his rights against the debtor or trustee (b).

(y) *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765, 769; *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; *Bank of Liverpool v. Holland* (1926), 43 T. L. R. 29; *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K. B. 81.

(z) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

(a) *Holroyd v. Marshall* (1862), 10 H. L. C. 191, 11 E. R. 999; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Glegg v. Bromley*, [1912] 3 K. B. 474.

(b) *Legh v. Legh* (1799), 1 B. & P. 447; 126 E. R. 1002; *Turner v. Smith*, [1901] 1 Ch. 213; *Yates v. Terry*, [1902] 1 K. B. 527.

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inoperative at law, was, as we have seen (l), effective in equity. The legal title to the chose in action remained with the transferor, but the equitable interest vested in the transferee. This, however, simply means that the transferor became a trustee of the chose in action for the transferee (m). In other words the transfer operated to create a trust and the distinction between a transfer and a declaration of trust disappeared in such a case.

An illustration of the second method of assignment occurs where the assignor himself has only an equitable title to the chose in action; here he does all that is in his power to assign the property if he assigns the equitable title which is all that he himself possesses; consideration for such an equitable assignment is therefore unnecessary. Again, legal choses in action being, before the Judicature Act, 1873, in general incapable of legal assignment, if the owner of them made an equitable assignment (which, as we have said, operated to create a trust) he did all that was possible for the purpose of transferring the property. In this case also, therefore, the gift was not incomplete within the rule in *Milroy v. Lord* (n), and consideration was not needed. Thus in *Fortescue v. Barnett* (o), the assignor by a voluntary deed purported to assign a policy of life insurance to trustees. The deed was delivered to the trustees, but the assignor kept the policy in his own possession and afterwards surrendered the policy to the company for value. No notice of the assignment was given to the company. The assignment was held valid and operative as between himself and the trustees. It is said by Leach, M.R. (p): "In the present case the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this Court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the *cestuis que trust*". Here, then, we have

(l) See p. 456, *ante*.

(m) *Hardoon v. Behlilos*, [1901] A. C. 118, 123.

(n) (1862), 4 De G. F. & J. 264; 45 E. R. 1185.

(o) (1834), 3 Myl. & K. 36; 40 E. R. 14.

(p) *Ibid.*; at p. 43, E. R. 17.

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have been worth far less than this. It was the third and last of these alternatives that the law actually accepted.

Notwithstanding the general principle, however, money which under the terms of the contract should have been paid before the date when the frustration occurred cannot be recovered if the case is such that had the money been paid before frustration it could have been recovered back on the ground that the frustration had brought about a total failure of consideration. In such a case the money is to be regarded, after the occurrence of the frustration, as never having become due (*m*).

(3) *Compensation for Part Performance.* In the third place, neither party can recover any compensation or remuneration for acts of part performance which have been done by him under the contract during the period of its subsistence, but for which payment was not already due at the date of the determination. He cannot sue for the agreed consideration for his services under the contract, for the contract has come to an end before that consideration became payable. Not having accrued due while the contract was still in existence, it cannot subsequently become due under a contract which is now inoperative. It might well be thought, however, that the law should allow him to recover as on a *quantum meruit* for the value of acts of part performance done by him. It might be thought, that is to say, that the law should, in the case of the accidental determination of a partly-executed contract, recognise the existence of a supervening implied contract to pay for acts of part performance done by the other party during the subsistence of the contract and in anticipation of its complete performance by both parties. In general, however, the law has refused to imply any such accessory or supervening contract. The acts of part performance were in reality done in pursuance of an express contract then actually subsisting, and the law refuses accordingly to treat them, even after the determination of that express contract, as having been done under an implied contract for the payment of their value.

In *Appleby v. Myers* (*n*) the plaintiffs contracted to erect certain machinery on the defendant's premises and to keep it in repair for two years, the price to be paid on the completion of the whole. After some portions of the work had been completed and others were in course of completion, the premises with all the machinery

(*m*) Cf. *per* Lord Wright, *Fibrosa v. Fairbairn, etc., Ltd.*, [1943] A. C. 32, 61; 59 L. Q. R. 128.

(*n*) (1867), L. R. 2 C. P. 651.

S.C.

that particular purpose. The common expression 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. Of course if you pass from the technical to the etymological effect of the words, 'specific performance' might signify any direction given by the Court for the doing of anything whatever *in specie*; and I cannot help thinking that in this class of cases a little confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions which have arisen as to the propriety of the Court requiring something or other to be done *in specie*". This by itself might suggest that in Lord Selborne's view specific performance *stricto sensu* was restricted to the enforcement of "executory" contracts. It is plain from the next part of the judgment, however, that this was not his view, and that he excluded "executed" contracts such as contracts for work and labour merely because equity, for reasons not in any way based on the distinction between executed and executory contracts, would not in general decree specific performance of them. "There is a considerable class of contracts", he continued, "such as ordinary agreements for work and labour to be performed, hiring, and service, and things of that sort, out of which most of those cases have arisen, which are not in the proper sense of the words cases for 'specific performance'; in other words, the nature of the contract is not one which requires the performance of some definite act such as this Court is in the habit of requiring to be performed by way of administering superior justice, rather than leave the parties to their rights and remedies at law. It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders, and a general superintendence, which could not conveniently be undertaken by any Court of justice; and therefore contracts of that sort have been ordinarily left to their operation at law." Nevertheless in certain cases positive obligations imposed by executed contracts will be directly enforced *in specie* and the relief in such cases is always called specific performance (s).

(s) See, e.g., *Wilson v. Furness Ry.* (1869), L. R. 9 Eq. 28; *Greene v. West Cheshire Railway* (1871), L. R. 13 Eq. 44; *Ryan v. Mutual Tontine, etc.*, [1893] 1 Ch. 116, 128; *Wolverhampton Corpn. v. Emmons*, [1901] 1 K. B. 515.

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PART VI

JUDICIAL REMEDIES

CHAPTER XXIV

JUDICIAL REMEDIES

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CORRIGENDA

PAGE

15. Line 23 (fifth line of second paragraph). After "agreement" insert "generally".
33. Third line from bottom of text. For "there" (first word) read "those".
87. Line 10. For "Inadequate" read "Deliberative".
103. Line 9. For "effect" read "affect".
107. Line 3. For "promise" read "promisee".
113. Line 2. After "It is" insert "as".
123. Fourth line from bottom. For "Summons" read "Summary".
125. Note (r). Add at end of note "An alternative interpretation of the facts is that Harrods, having done something other than that which they were instructed to do, offered to accept from their client a promise of commission for what they had done if he would give such a promise. Clearly such a promise would be unsupported by any sufficient consideration.
- On the question of what a land or house agent must do to earn his commission this case should be compared with *Luxor, Ltd. v. Cooper (supra)* and *Jones v. Lowe*, [1945] 1 K. B. 73.
139. Line 8 (first line of s. 49). For "of" read "or".

THE LAW OF CONTRACTS

PART I

THE NATURE OF A CONTRACT

IN this part we first consider the jurisprudential characteristics of a contract and distinguish it from other acts in the law. Having then regarded the contract *ab extra*, as it were, we proceed to consider its internal elements, or terms.

CHAPTER I

ANALYSIS AND DEFINITION OF CONTRACT

§ 1. Contract Involves Conceptions of Obligation and Declared Will

The law of contracts is an important part of the law of obligations. It is the law pertaining to certain of those legal obligations whose source is either the declared will, legally effective in accordance with its tenor, of the party by whom the obligation is owed, or the concurring declared wills, legally effective in accordance with their tenor, of him and the party to whom he owes the obligation. The party by whom an obligation is owed is called the obligor and the party to whom it is owed, the obligee.

The declared will is a conception of wider import than contract, for it may have other legal purposes and operations than the creation of a contractual obligation, or it may have no legal purpose or operation at all. On the other hand there are many legal obligations which arise from other sources than the declared will of the obligor or the concurring declared wills of the obligor and the obligee; and even of those obligations which have such a source, some are not contractual. The law of contracts deals with only a part, though

certainly by far the larger part, of the area within which the conceptions of obligation and the declared will are co-incident.

Inasmuch, therefore, as contract is largely the conception of obligation interwoven with that of the declared will an analysis of contract may conveniently begin with a consideration of these two conceptions. Accordingly it is proposed to consider first obligation; next the declared will, marking off such forms of it as are not contractual and examining in some detail its contractual forms; and then to offer a definition of a contract.

§ 2. Obligation

Obligation is here used in its proper and legal sense—derived from the *obligatio* of the Roman lawyers—and not in its popular sense. The latter, unfortunately, differs from the former in two respects. In the first place, the term as popularly used is a mere equivalent of duty. All duties are conceived and spoken of as obligations. In the strict and legal usage, however, an obligation is only one kind of duty; it is that kind which corresponds to a right *in personam* vested in him to whom the duty is owed. In other words, obligation in its proper sense is limited to legal duties arising out of a special personal relationship existing, whether by reason of a contract or in any other manner, between two or more individual persons; the relationship, for example, that exists between a debtor and his creditor, between a purchaser and a vendor, between two partners, between a principal and his agent, between a trustee and his beneficiaries, or between a person injured by a tortious act and the wrongdoer who is bound to pay him compensation for the injury so inflicted. But a duty is not properly called an obligation in the legal sense when it is imposed by the law upon persons in general, instead of being a special burden imposed upon a particular individual by reason of some special relation in which he stands towards him to whom the duty is owing—in other words, when it corresponds, not to a right *in personam*, but to a right *in rem*: for example, the duty imposed upon all men not to trespass upon the property of others, or not to publish libels, or not to commit perjury. The duty of a man not to appropriate his neighbour's horse is not *obligatio*, but *officium*, for it corresponds to a right *in rem* and lies on all men equally; but his duty to pay his debt to his neighbour is an *obligatio*, for it corresponds to a right *in personam*, having its source in a special relationship existing exclusively between these two persons.

In the second place, the Roman term *obligatio* (and the English

term obligation itself when used in its strict and legal sense) denotes not merely the duty, but also the corresponding right. In other words, it denotes the entire relationship between the parties—the *vinculum juris* as the Roman lawyers called it—which unites, for example, a debtor to his creditor or one contracting party to the other. Looked at from the point of view of the creditor, or other person entitled, this *obligatio* or *vinculum juris* is a right; looked at from the point of view of the debtor, or other person bound, it is a duty and a liability; and the term *obligatio* indicates both of these aspects. A debt is the *obligatio*, not merely of the debtor, but of the creditor also. In the contrasted popular sense, however, the term denotes the duty or liability exclusively. The distinction may be illustrated by the use of the word debt, which to some extent possesses the same double significance as *obligatio*. A debt is the right of the creditor no less than the liability of the debtor. It is a relationship with a double aspect. Commonly, when a man speaks of his debts, he means the debts owing by him, but when he speaks of his book debts he means the debts owing to him.

This departure by popular speech from the legal significance of the term *obligatio* is one of the misfortunes of legal nomenclature. It deprives us of any unambiguous technical name for that *vinculum juris*, contractual or otherwise in its origin, which exists between the owner of a right *in personam* and the person upon whom the corresponding liability is imposed. It will be convenient to use the Latin term *obligatio* instead of the corresponding English term in all cases in which confusion or misconception might otherwise arise from the use of the popular term in a technical sense.

§ 3. Declared Will

The will to which effect is given by the law is not a party's secret unavowed will but only his will declared and announced so that those affected by its legal operation and the Courts called upon to enforce it may know its contents. In the words of Brian, the great mediæval Chief Justice of the Common Pleas, "it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man" (a). The law deals not with a person's actual intentions, which can never be certainly known,

(a) Y.B. 17 Edw. IV, 1; *Brogden v. Metropolitan Ry.* (1877), 2 App. Cas. 666, 692; *Norwich Union Fire Insurance Society v. Wm. H. Price, Ltd.*, [1934] A. C. 455, 463; Lord Wright in 55 L. Q. R. at pp. 194, 197, reprinted in *Legal Essays and Addresses*, 210, 215; Savigny, *System*, in French translation under title *Traité de Droit Romain*, vol. 3, pp. 313—314, sec. 140; Markby, *Elements of Law* (6th ed.), p. 122, sec. 232.

but with what are to be inferred from his words and conduct to be his intentions. "The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions" (b).

Contract is one of the most important forms in which the declared will is legally effective. But, as we have said, the declared will may be effective in the law otherwise than as a contract. A contract or an essential part of it is always the obligor's declared will. That is to say the will, or one of the wills, which the law of contract renders effective is always the will of the person to be detrimentally affected by the legal efficacy of that will. Where the law renders effective the expressed will only of some person other than the person detrimentally affected by the legal efficacy of that will, that will does not constitute a contract, but a command (c).

But even although the declared will or one of the declared wills which the law renders effective is the will of the person detrimentally affected that will or those wills will not necessarily constitute a contract but may constitute some other act in the law—a conveyance, surrender, grant or the acceptance of a voluntary status. An act in the law "is any expression of the will or intention of the person concerned, directed to the creation, transfer, or extinction of a right, and effective in law for that purpose" (d).

§ 4. Conveyances, Surrenders, Grants

A conveyance is an act in the law operating to transfer a right or rights from the conveying party to the purchaser. Conveyances are also sometimes called assignments or transfers; but all three words are essentially synonymous, although the arbitrary usage of

(b) Leake, *Law of Contracts* (8th ed.), 2; see also Holland, *Jurisprudence* (13th ed.), 120 ff., 262 ff. The principle indicated in the text is an application of the law of estoppel by representation, by which a person is precluded from denying the truth of any fact in whose existence he has led another person to believe, so as to induce that other to alter his previous position in such a way that he would suffer detriment if the existence of the fact were, after his having so acted, allowed to be denied. See *Greenwood v. Martins Bank*, [1933] A. C. 51, 57. It appears to be a sufficient change of position that a person should enter into a contract with another, and a sufficient detriment that if the other should thereafter be allowed to set up that the contract meant something different from its apparent meaning it would be less advantageous to the first-mentioned person than it would in its apparent meaning. See *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, and *Tamplin v. James* (1879), 15 Ch. D. 215. Coke says that estoppel is so called "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth": Co. Litt. 352 a. In the law of contract estoppel especially obtrudes itself in cases on communication of offer (pp. 72 *et seq.*, *post*) and *error in consensu* (pp. 208 *et seq.*, *post*).

(c) Cf. Savigny, *op. cit.*, p. 314, sec. 140.

(d) Salmond, *Jurisprudence* (7th ed.), 360.

speech draws certain distinctions between them in respect of their application. We commonly speak, for example, of the conveyance of real property, but of the assignment or transfer of personal property. A conveyance, assignment or transfer is just as much an instance of the legal efficacy of the declared will of the person detrimentally affected by the legal operation of that will as is a contract. But it is not a contract, for it does not result in the creation of an obligation. It does not create any rights of any kind, but merely alters the ownership of existing rights.

A surrender is an act in the law operating to destroy a right against the surrenderee vested in the surrenderor. A surrender is also sometimes called a release, waiver, abandonment or disclaimer. A surrender differs from a contract in that it does not result in the creation of an obligation between the parties, but, on the contrary, cuts and severs the bond whether of obligation or other right already existing between them.

Conveyances and surrenders are the declared will directed to the transfer or destruction of rights. But the declared will may be directed not to the transfer or destruction of rights but to the creation of them. The rights so created may be either obligations, i.e., *jura in personam*, or rights of some other kind. Acts in the law operating to create rights other than obligations may all be conveniently classed together under the title of grants. They are of many different descriptions. Examples are grants of leases, easements, licences, charges, or liens. Such grants are, equally with surrenders, conveyances and contracts, forms of the legally effective declared will. But they are not surrenders because they create rights, not destroy them. And because they create rights which operate as encumbrances upon the existing rights of the grantor and do not transfer existing rights from the grantor to the grantee they are not conveyances. But although grants create new rights they are not contracts, for the new rights so created are not rights *in personam* or *obligationes* between the parties. The right acquired by the lessee through the grant of a lease is not a mere *obligatio* between him and his landlord. It is a right *in rem*—an estate or interest in the land—available not merely against the landlord, but against all the world. Such grants, therefore, are essentially distinct both from conveyances or assignments on the one hand and from contracts on the other. A contract to sell land creates an obligation between the parties whereby the seller is bound to convey to the buyer. A conveyance of that land in pursuance of that contract does not create rights but transfers

them. Similarly, a contract to grant a lease creates an obligation to execute a deed of lease, but the deed when executed is a grant. Unlike a conveyance, it creates a right instead of transferring one; but, unlike a contract, it creates a right *in rem* and not an *obligatio*.

§ 5. Further Consideration of Difference between Contracts and Conveyances, Surrenders and Grants

It appears from the foregoing discussion that contracts may be distinguished from conveyances, surrenders and grants because contracts are productive of obligation whereas conveyances, surrenders and grants are not. Now, it is of the essence of an obligation that by virtue of it the obligor may be required by the obligee to do or refrain from doing something (e). That is to say, an obligation has reference to the future conduct of the obligee. This quality of futurity which is the characteristic of every obligation is therefore likewise the characteristic of every contract. In respect of this quality of futurity an obligation, and therefore a contract, is described, in the technical language of the law, as executory. After the making of a contract there still remains something to be done by one or both parties in the performance thereof. In the case of conveyances, surrenders and grants, however, the position is otherwise. They are executed or complete in their operation so soon as made. There is nothing to be done by either party in performance of them. They derive their full force from the very fact that they have been made. A contract represents something to be done by one or both of the parties; conveyances, surrenders and grants represent something there and then done with full and final force and effect. So far as anything still remains to be done in pursuance of any conveyance or grant, this is due to the concurrent existence therein of a contractual element—*e.g.*, the covenants of a lease. So far as a contract becomes by subsequent performance completely executed, it ceases to exist.

It is sometimes sought to indicate this distinction between contracts on the one hand and conveyances, surrenders and grants on the other by defining a contract as a legally binding promise. It is said that the presence of a promise as to something to be done in the future is an essential mark of a contract, but is no part of a conveyance, surrender or grant. Promise is here used in a broad

(e) Cf. the definition of obligation by the juriconsult Paulus (Dig. xlvii 7. 3. pr.): "Obligationum substantia non in eo consistit ut aliquod corpus nostrum faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum."

sense to cover both an undertaking by the obligor to do or refrain from doing something; and an undertaking by him that a certain state of facts exists or that some one else will do something. In the latter cases the *executory element* consists in the promisor's liability to pay damages if his undertaking should be falsified by the facts or the event. That is to say his undertaking may be regarded as a promise to pay damages in that case (f). The use of the term *promise* in the analysis of the conception of a contract and in the discussion of contractual relationships is convenient as indicating in popular language the characteristic executory element and also as supplying the useful terms *promisor* and *promisee* whereby to distinguish the parties to a contract. It must not be supposed, however, that by defining a contract as a promise we are saved from the necessity of further analysis. To say that a contract is a promise is not to analyse the nature of a contract, but merely to supply another name for it.

§ 6. Status and Contract

There remains for consideration the declared will operating to create an obligation. The declared will which is a contract is of this kind. But does every case of legally effective declared will of this kind constitute a contract? There is a tempting simplicity in the suggestion that it does. Nevertheless, the position is otherwise. An examination of the contents of the actual legal system shows us the existence of obligations which certainly have in one sense their source in the declared will of the parties, but which are nevertheless not regarded as contractual. It will be well to illustrate this difficulty before attempting to solve it. An example is to be found in the statutory obligation of an employer to pay compensation under the Workmen's Compensation Act, 1925, to servants injured by accident while in his employment. This is an obligation which is created by the concurring declared wills of the master and the servant in the sense that it would not have existed but for the concurrence of those wills whereby the relationship of master and servant was constituted. Nevertheless, it is clearly not regarded by the law as contractual (g). On the other hand, the obligation to pay wages is contractual. Yet neither the obligation to pay compensation nor the obligation to pay wages would have existed but for the contract of service. Similarly the obligations assumed

(f) See p. 45, *post*.

(g) *Myntott v. Barnard* (1939), 62 Commonwealth L. R. 68, 78, 89, 91.

by an executor, or by the holder of any statutory office—obligations which he takes and imposes upon himself by accepting the position of which they are incidents, *i.e.*, by expressing his will in this sense—are yet not conceived by the law as contractual. So with the mutual obligations of husbands and wives. Marriage certainly is founded upon the concurring declared wills of the parties, but it is not properly to be classed as a contract. The obligations which a husband owes to his wife are not in their true nature contractual, and a disregard of those obligations is not a breach of contract. The duty of a husband to maintain his wife is no more contractual in its origin than is his duty to maintain his children.

What, then, is the explanation of these obligations which, though having their source in the declared wills of the parties, are nevertheless not regarded as contractual? The solution of this difficulty, it is suggested, is to be found in this, that although the assumption of such an obligation is dependent upon the declared wills of the parties the nature and contents of it are not so dependent but are defined and determined authoritatively by the law itself independently of the wills of the parties. The nature and contents of a contractual obligation, however, are determined and defined by the declared will which constitutes the contract, the law contenting itself with giving legal force and authority to that declared will (*h*).

Thus a marriage is not a contract, for although it is left to the parties to determine by their declared wills whether the relationship shall come into existence, it is not left to them so to determine what the legal consequences shall be when it does come into existence (*i*). The law determines this for itself. One may contrast with a marriage a partnership contract or a contract of service operating at common law; in these latter cases not only the existence of the obligations between the parties, but also the contents of those obligations arise from the declared wills of the parties. Where, however, in the case of a contract of service the Workmen's Compensation Act is applicable, the position, so far as regards the master's obligation to pay compensation in a certain event, is otherwise, notwithstanding that the obligation in question has its source in a contract of service. For the nature and consequences of that obligation are not defined by the declared wills of the parties but

(*h*) See *Vincent v. Tauranga Electric Power Board*, [1937] A. C. 196, 203; *Read v. Croydon Corporation*, [1938] 4 A. E. R. 631, 647-8; *Mynott v. Barnard* (1939), 62 Commonwealth L. R. 68, 78, 91. Cf. Allen, *Legal Duties* (1st ed.), 37-38.

(*i*) *Brodie v. Brodie*, [1917] P. 271.

by the law itself, any agreement by the parties to the contrary notwithstanding (*k*).

Contract Contrasted with Status. The distinction we have made is sometimes indicated by contrasting contract with *status*. Obligations whose nature and content are defined by the law independently of the wills of the parties are said to be matters of *status* (*l*) and may be called *status-obligations*. Status is, indeed, a term to which a bewildering variety of meanings has been ascribed. As Dr. Allen remarks (*m*), it is elastic to snapping point. It may perhaps be defined as the condition of a person's belonging to a particular class (*n*) of such a kind that legal consequences of a nature and content determined by the law itself, and not by the will of the person who is the subject of the status or the concurring wills of that and any other person or persons (*o*), result to its members from the mere fact of belonging to it. These consequences are commonly said to be of two sorts, either capacities and incapacities, or rights and duties. We are here concerned only with cases in which the result of a status is to impose upon the person possessing it a duty or duties or entitle him to a right or rights, the nature and content of these rights or duties being defined and determined by the law itself (*p*). But although it is an essential mark of a

(*l*) Cf. p. 31, n. (*c*), *post*.

(*l*) Thus Professor Dicey, writing of workmen's compensation legislation, remarked (Law and Public Opinion in England, 283) that "the rights of workmen in regard to compensation for accidents have become a matter not of contract but of status".

(*m*) Legal Duties (1931), p. 33.

(*n*) Austin, Jurisprudence (5th, Campbell's, ed.), 688; Markby, Elements of Law (5th ed.), p. 101, sec. 177; Allen, *op. cit.*, 42.

(*o*) Markby, *op. cit.*, p. 101, secs. 178—180; Allen, *op. cit.*, 38—41. Cf. Anson, Contracts (1st ed.), 329, quoted by Allen, p. 39.

(*p*) Austin wrote (Jurisprudence (5th, Campbell's, ed.) 401): "To determine precisely what a *status* is, is in my opinion the most difficult problem in the whole science of jurisprudence." Perhaps the most helpful discussion of this problem by an English writer is to be found in Dr. Allen's Lecture on Status and Capacity printed in 46 L. Q. R. 277 and now included in Legal Duties, 28 ff. After a careful survey of the views of other writers Dr. Allen defines (p. 42) *status* as "the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both"; and he draws a clear distinction between status, capacity and incapacity, and the rights and duties flowing from the capacity or incapacity. This, it will be observed, excludes from the meaning of status the condition of belonging to a particular class where the direct result of membership is to produce rights and duties and not capacities and incapacities. For example, to the extent that being a husband or a wife (and therefore a member of the class of husbands or wives) is directly productive of matrimonial obligations and not capacities and incapacities it would not come within Dr. Allen's definition. Similarly, in the case of parent and child. Yet, quite independently of any question of capacity or incapacity, the conditions of these several persons and of persons in a like position are usually regarded as *status*. Markby, *op. cit.*, p. 101, sec. 178; Austin, Jurisprudence (5th, Campbell's ed.), 688; Salmond, Jurisprudence (7th ed.), 265—268. Dr. Allen's arguments

status-obligation that its contents should be defined by the law independently of the will of the person subject to the status, it is in no wise necessary that the assumption of the status should be independent of his will. A status may be either voluntary or involuntary. The assumption of a contractual obligation is always dependent upon the declared will of the obligor, whereas the assumption of a status-obligation may or may not be so dependent. Thus the obligations between husband and wife arising out of the marriage relationship are voluntary obligations in the sense that marriage is dependent upon the concurring declared wills of the parties, whereas the obligations between parent and child arising out of that relationship are not. Yet both of these sets of obligations are of essentially the same character: they are both sets of status-obligations; and the mere fact that the former set is dependent for its existence though not its content upon the wills of the parties does not destroy or obliterate the essential distinction between it and contractual obligations. To take another example, the military obligations of a soldier pertain, not to the domain of contract, but to that of status as determined by the Army Act and the King's Regulations whether the soldier has acquired his status by voluntary enlistment or by conscription (*pp*).

Effect on Definition of Contract. It is evident from the foregoing discussion that to say that contract is that form of the declared will which operates to constitute an obligation between the parties would be inadequate in that it would include the declared will directed to the acceptance of a voluntary status giving rise to obligations. To overcome this objection our definition must indicate not merely the constitutive operation of the declared will but also its definitive operation. We must say not only that the declared will constitutes the obligation but also that it defines and determines its contents (*q*).

to the contrary (*pp*. 43, 44), expressed chiefly in the form of examples, do not seem entirely convincing. It is thought that the definition offered in the text, including as it does cases which Dr. Allen rejects, nevertheless does not go beyond what is commonly understood by the word *status*.

(*pp*) But a person "directed" into employment in pursuance of emergency powers is none the less employed under a contract of employment: *Alexander v. Tredegar Iron and Coal Co.*, [1944] K. B. 390 (C. A.).

(*q*) Cases in which the law says that if the parties have any obligatory relations they shall be of a prescribed content must not be confused with cases in which the law by its rules as to illegal and nugatory contracts simply says that certain sorts of obligations may not be effectively entered into but does not in any positive way determine the contents of the obligations which the parties may assume. The latter cases do not depend upon status but on the limits of subject-matter beyond which efficacy is not allowed to contracts. Thus the rules as to penalties, contracts in restraint of trade, the clogging of the equity of redemption and others of the

§ 7. Mixed Transactions

In the course of the foregoing discussion we have observed five distinct classes of the legally effective declared will.

1. *Contract*, where obligations are constituted and defined between the parties by the declared will of the obligor or the declared wills of the obligor and the obligee.

2. *The acceptance of a voluntary status* to which are attached obligations whose contents are defined by the law itself and are incapable of variation by the parties—*e.g.*, marriage.

3. *Grants*, which create rights of any other kind than obligations or *jura in personam*—*e.g.*, the grant of a lease, licence, power, lien or charge.

4. *Conveyances or assignments*, which transfer rights of any kind from one owner to another.

5. *Releases or surrenders*, which destroy rights of any kind.

Although this classification is based on clear-cut, logical distinctions, there is nothing to prevent the same transaction from belonging to two or more of these classes at the same time. For a transaction may be complex in its nature, containing different parts of different natures in this respect. Thus the same transaction may be both a contract and a grant; it may create both rights *in personam* and rights *in rem*. This is so, for example, with the grant of a lease. A leasehold estate is thereby created and vested in the lessee, and to this extent the transaction is a grant; but the same instrument will commonly impose personal obligations upon the parties, such as to pay rent or to keep the demised premises in repair, and to this extent the transaction is a contract. Similarly, the same agreement may be both a contract and an assignment, as in the case of the sale of goods on credit when the ownership of the goods passes to the buyer immediately on the making of the contract. As to the passing of the ownership to the buyer, the transaction is an assignment; as to the obligation to pay the price, it is a contract. So a loan of money is a transaction which combines in itself the transfer of money to the borrower with a contract by him to repay an equal sum. Similarly, the same transaction may be both a contract and a release—as where the parties cancel an existing contract by substituting another in its place.

same sort are rules which operate to avoid certain kinds of contractual obligations not because of anything in the status of the parties but because the law says that the creation of such obligations is beyond the limits allowed to the operation of contract. Cf. Allen, *Legal Duties* (1st ed.), 36.

So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status. In those jurisdictions in which industrial relationships are extensively regulated by law, as, for example, by the awards of Courts of Industrial Arbitration, the relationship between master and man has already become to a large extent a matter of status, and is no longer entirely, or even to any considerable extent, a matter of contract. The obligations of the master as to wages, hours of work, holidays, and conditions of employment are defined by the law itself, and to this extent the relation between master and servant, though constituted by the declared wills of the parties, has become one of status instead of one of contract. The opposite process of legal development is equally possible (r). Relationships which are now pure matters of status, such as marriage, may by reason of altered views of public policy become in divers respects matters of contract (s).

§ 8. Specialty and Agreement

Is a contract founded in the declared will of the obligor alone or in the concurring declared wills of the obligor and the obligee? This is merely a special aspect of the larger question: Are acts in the law, generally, founded in the declared will of the person detrimentally affected by them or in the concurring declared wills

(r) And, indeed, during the latter part of the nineteenth century was regarded by many as the only possible line of legal progress. See Maine, *Ancient Law* (Pollock's ed.), 172—174.

(s) Cf. *Fender v. Mildmay*, [1938] A. C. 1.

of him and the person beneficially affected? The name we give to concurring declared wills is *agreement*. Agreement is the "union, collection, copulation, and conjunction of two or more minds in anything done or to be done" (t). It is the union into a single, whole and undivided declaration of will of declarations, each in the same sense, by several persons of their wills in respect of a particular matter (u). It connotes, moreover, that the wills of the parties should coincide at one and the same time (x). As we shall see later (y), however, in this matter the law sometimes treats as indicative of contemporaneous coincidence facts which do not logically necessitate that conclusion. In such cases we may say that the coincidence of wills is merely constructively contemporaneous.

Using the term "agreement" our question may be thus stated: Is agreement of the parties essential to the validity of acts in the law, including contracts?

Unilateral Assent Otherwise than in Contract—Necessity for Deed. Putting aside contract for the moment, we find that it is not invariably necessary to the validity of most acts in the law that they should be based on the agreement of the parties; it often suffices that the will of only the person detrimentally affected by the act should be declared. Thus in *Sir Simon Leech's Case* (z) a deed of surrender of an estate in land was held to be effective even before the surrenderee had heard of it. So in *Naas v. Westminster Bank* (a) a party had executed a deed of settlement which he subsequently claimed to revoke on the ground that it was merely an offer which had not been accepted by the beneficiary. This contention was emphatically rejected by the House of Lords. Lord Russell of Killowen, referring to a letter written by the settlor's solicitors advancing that contention and requesting an assurance that the trustee would not communicate with the beneficiary, said (b): "It is difficult to speak with restraint of this letter and request, which can only have been written and made by a writer who had forgotten that the settlement had been signed, sealed and delivered unconditionally by the settlor, or who failed to appreciate the effect

(t) Serjeant Pollard arguing in *Reniger v. Fagossa* (1550), Plowd. at p. 17; 75 E. R. at p. 27.

(u) Cf. Savigny, *op. cit.*, p. 315, sec. 140; *Naas v. Westminster Bank*, [1940] A. C., per Lord Wright at 403.

(x) Per James, L.J., in *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 472.

(y) See p. 88, *post*.

(z) (1692), Carth. 250; 90 E. R. 749; s.c. *sub nom. Thompson v. Leach*, 2 Vent. 198; 86 E. R. 391.

(a) [1940] A. C. 366.

(b) At p. 496.

in law of that act" (c). In these cases, then, the essential feature is not the bilateral *consent* of both parties, but the unilateral *assent* of the person detrimentally affected by the act. The law renders the act operative against him because he has assented to it.

But in order that the mere assent of the party to be detrimentally affected should be thus effective, it must be expressed or declared in a particular and formal way, *viz.*, by deed. In some cases, indeed, the act in the law cannot be effected except by deed (d). This is so in the case of grants, conveyances and surrenders of legal estates in land (e). But generally the position is otherwise and acts in the law may be effected without a deed. In the absence of a deed, however, there must generally be added to the assent of the party detrimentally affected the assent of the other party—that is, there must be agreement—and as well there must be either what is known in the technical language of the law as *consideration*, or, in one case—that of the assignment (f) of chattels—an actual delivery of the subject-matter of the transaction. Consideration, which at a later stage of our inquiry (g) we shall discuss and analyse in detail, may be said to consist in detriment presently suffered by one party to an agreement or his promise to suffer detriment, the detriment or promise to suffer it being regarded by the law as constituting the inducement to the other party to join in the agreement (h).

(c) For further illustrations. see Norton, Deeds (2nd ed.), 17.

(d) See Halsbury, Laws of England (2nd ed.), vol. 10, pp. 172 ff.

(e) S. 52, Law of Property Act, 1925

(f) That in the absence of a deed agreement plus delivery is enough is clearly settled in one case of assignment of chattels, *viz.*, assignment by way of gift: *Cochrane v Moore* (1890), 25 Q. B. D 57. Moreover in *Stocks v. Wilson*, [1913] 2 K. B. 235, this was held to be enough where the agreement that the property should pass was part of a contract of sale avoided by the Infants Relief Act, 1874, and the delivery had been made and presumably accepted on the footing that the contract was valid. See also *Simpson v Nicholls* (1838), 3 M. & W. 240, *per Parke*, B, 244, 150 E. R. 1132, 1133-4; as corrected by note in 5 M. & W. 702; 151 E. R. 298. *Cundy v Lindsay* (1878), 3 App. Cas. 459, is not necessarily an authority to the contrary, for there there was no agreement that the property should pass to the person to whom delivery was in fact made. Cf. *per Lord Sumner* in *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.*, [1926] A. C. 670, 696.

(g) See pp. 97 *et seq.*, *post*

(h) These rules as to deeds and agreements marked by consideration were rules of the common law, but the Courts of equity generally followed them on the principle *Aequitas sequitur legem*. Cf. *Naas v Westminster Bank*, [1940] A. C., at 401. The common law rules as to the cancellation of instruments and the disclaimer of deeds (pp. 502, 503, *post*) constitute exceptions to the requirement of consideration in the absence of a deed, and other exceptions have been introduced by statute, *e.g.*, s. 136, Law of Property Act, 1925, as to the assignment of choses in action, p. 468, *post*, or borrowed from the law merchant; *viz.*, the rules as to renunciation of bills and notes, p. 503, *post*, and the assignment of negotiable instruments (some of which rules are now contained in the Bills of Exchange Act, 1882). And whether consideration was or is necessary to support equitable assign-

Thus with *Sir Simon Leech's Case* already mentioned may be contrasted *Edwards v. Chapman* (i). In that case the plaintiff sued for the price of goods sold and delivered. The defendant pleaded a mere naked agreement whereby it was agreed between him and the plaintiff that the contract should be wholly rescinded and annulled; but this plea was held bad. The position may be further illustrated by reference to the passing of the property in goods. In *Siggers v. Evans* (k) it was held that a deed of assignment was effective to pass the property in goods to the assignee although he had no knowledge of the execution of the deed. In *Cochrane v. Moore* (l), on the other hand, an agreement as to the gift of a share in a chattel neither supported by consideration nor accompanied by delivery, was held ineffective to vest the share in the intended donee. With *Cochrane v. Moore* may be contrasted the rule that a contract for the sale of specific or ascertained goods, which is based on consideration and is not ordinarily by deed, passes the property in the goods at the time when the parties intend it to pass (m).

In cases such as we have been discussing, therefore, mere unilateral assent is effective only if expressed as a deed. There may, in addition, be agreement; but this is not the essence of the matter. If there is no deed, however, and the particular act in the law can be effected at all otherwise than by deed, agreement becomes necessary, and that must, except in one instance, be marked by the presence of consideration. As has already been indicated, in this case of the assignment of chattels, where there is agreement but no deed, actual delivery will suffice in place of consideration: but mere naked agreement is of no more avail to effect an assignment of chattels than in the other cases we have noticed.

Unilateral Assent in Contract—Necessity for Deed. How, then, does the matter stand with reference to the law of contracts? It

ments is a matter of great confusion and uncertainty. It certainly seems that in some cases equitable assignments not being by deed nor yet supported by consideration are, quite apart from the Law of Property Act, 1925, valid. See pp. 462 *et seq.*, *post*. The major and undoubted equitable exception to the general rule, however, is in the field of trusts. Neither consideration, agreement nor a deed is essential to the creation of a trust, but a simple declaration by the settlor of his intention presently to subject himself to a trust, if otherwise complying with the requirements of the law for the constitution of a trust, will be legally effective: *Milroy v. Lord* (1862), 4 De G. F. & J. 264, 274-5; 45 E. R. 1185, 1189-90; quoted p. 463, *post*; Maitland, *Equity* (2nd ed.), 54, 56, 68-9; Ashburner, *Equity* (2nd ed.), 93.

(i) (1836), 1 M. & W. 231; 150 E. R. 419.

(k) (1855), 5 E. & B. 367; 119 E. R. 518

(l) (1890), 25 Q. B. D. 57.

(m) Sale of Goods Act, 1893, s. 17 (1).

is quite commonly said, indeed, that every contract is a kind of agreement; that it necessarily involves and requires the consent of both of the contracting parties; that it is necessarily based on the concurrence of their two minds in accepting the terms of the contract as determining their mutual rights and obligations (n). Nevertheless there is no logical reason why the declared will of only the party to be detrimentally affected by any legal efficacy allowed to that will should not be equally as effective here as it is in the cases of conveyance, grant and surrender. And this, it is well established, is the law, despite the common definitions of a contract as a species of agreement. And, as in the case of other acts in the law in which unilateral assent of itself is operative, the will must be declared in the form of a deed. Thus in *Hall v. Palmer* (o) a man executed a bond conditioned for the payment of an annuity after his death to a woman with whom he had cohabited. After his death the bond was found in the possession of his solicitor. It was held that the bond created a legal obligation in favour of the woman on whose behalf it was made, and was enforceable by her against the executor of him who made it, although it had not been delivered to her in his lifetime and there was no evidence that she had then any knowledge of its existence. So in *Fletcher v. Fletcher* (p) the father of two illegitimate children executed a voluntary bond whereby he covenanted with trustees that his executors would pay those trustees the sum of £60,000 within twelve months after his death on trust for those children. He retained the deed in his own possession, and its existence was not known either to the trustees or to his children in his lifetime. It was held, nevertheless, that the deed constituted a good contract between him and the trustees, and that they were entitled to recover the stipulated sum from the executors of his estate (q).

Cases such as these illustrate a principle of the common law not peculiar to the law of contract, viz., that a deed, whether directed to the creation of contractual obligations or the effecting of any other act in the law, operates immediately upon the party to be bound or otherwise detrimentally affected by it signifying his assent to it (i.e., executing it as his deed) in the manner required by

(n) Anson, *Contract* (17th ed.), 2 ff., 8; Holland, *Jurisprudence* (13th ed.), 268 ff.; Holdsworth, *History of English Law*, vol. 8, 1; Halsbury, *Laws of England* (2nd ed.), vol. 7, 65.

(o) (1844), 3 Hare 532; 67 E. R. 491.

(p) (1844), 4 Hare 67; 67 E. R. 564.

(q) See also *Xenos v. Wickham* (1867), L. R. 2 H. L. 296; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; 108 E. R. 250. Cf. *Re Pryce*, [1917] 1 Ch. 234; *Re Kay's Settlement*, [1939] Ch. 329.

law (r); and does not require, to enable it to operate, the consent of the other party (s). "The operation of a deed is not suspended by the fact that the person entitled to the benefit of it is ignorant of its existence" (t). So likewise the operation of a deed as against an executing party is not suspended merely because other parties who are also named as grantors or obligors have failed to execute the deed. "If there be divers grantors, obligors, etc., named in a deed, and one of them only do seal the deed, this is a good deed as against him that doth seal, and void as to all the rest that do not seal" (u). A party may indeed execute a deed subject to the condition that it is not to bind him unless some other party should execute but meanwhile should be an escrow (x); or while the execution may be unconditional the deed itself may be expressed to be subject to such a condition (y). Moreover, it would seem that on equitable principles one of several parties named in a deed who executes it in the expectation that the others will also execute it will not be bound if the others fail to execute it and the obligation which would fall on him would in consequence be different from that which would have fallen on him had the others executed the deed (z). Nevertheless the rule in general is that a deed, whether constituting a contract or any other act in the law, operates against a party immediately he executes it.

Where, however, there is no deed, then mere unilateral assent, no matter how clearly declared, is generally of no more efficacy to create contractual obligations than to constitute a conveyance, grant or surrender. As in those cases, so in cases of contract, in the

(r) See pp. 61 *et seq.*, *post.*

(s) "I think it is misleading", said Lord Wright in *Naas v. Westminster Bank*, [1940] A. C. 366, 403, "to import into the law of deeds analogies from an entirely different region of law, that of simple contracts. They indeed are consensual, and depend on a meeting of minds in a common intent, evidenced by words or conduct. It is from this mutual consent that the rights and duties under the agreement arise. This might be the position in a case of a simple agreement to convey property. But the deed in question is something different. The declaration of trust by the settlor depended not on the other party's consent any more than on mutual consideration. It depended on an act of the settlor in executing the settlement. The beneficiary might, it is true, disclaim, but her acceptance was immaterial except perhaps as ruling out disclaimer. . . . The law as to obligations or transfers under seal was fixed in days before the nature of the consensual contract was realised."

(t) Norton, *Deeds* (2nd ed.), 17.

(u) Sheppard's *Touchstone*, 71; *Naas v. Westminster Bank*, [1940] A. C., *per* Lord Romer, 409.

(x) See p. 66, *post.*

(y) *Naas v. Westminster Bank*, at p. 403, *per* Lord Wright.

(z) *Naas v. Westminster Bank*, *supra*.

absence of a deed there must generally be agreement supported by consideration (a).

It must not, indeed, be supposed that deed and agreement are mutually exclusive. Although agreement is not essential to a deed it is most commonly the case that the parties are in fact agreed and that their deed is intended to and does embody and give effect to their agreement. But the deed as such is not dependent for its legal efficacy upon agreement and in particular not upon that kind of agreement which is marked by consideration. This statement is not inconsistent with the principle that a person who is unwittingly made the recipient of a bounty may disclaim it. In such a case the deed, in accordance with the general rule, operates immediately the maker executes it and remains a valid and effective instrument until the party benefiting under it disclaims the benefit (b).

Summary. In the result, therefore, we may say that there is no universal and absolute rule making the concurrence and consent of both parties essential to the creation of a valid contract. The universally essential element is the assent of the party to be detrimentally affected by the legal efficacy of the contract, and not the consent of the other party (c).

(a) *Rann v. Hughes* (1778), 7 T. R. 350; 101 E. R. 1014. The rule as to the necessity of consideration to support simple contracts is in the case of bills of exchange and promissory notes subject to exceptions introduced into the common law from the law merchant and now contained in the Bills of Exchange Act, 1882. See p. 128, *post*.

(b) *Siggers v. Evans* (1855), 5 E. & B. 367, 380; 119 E. R. 518, 523; *Naas v. Westminster Bank*, [1940] A. C. 366.

(c) There is to be discerned in some writers (*e.g.*, Anson, *Contract* (18th ed.), 33; Holland, *Jurisprudence* (13th ed.), 281) a tendency to regard the contract by deed, operating as it does immediately upon execution by the party to be bound even though its existence may be unknown to the party to benefit under it, as a regrettable anomaly which is capable of explanation on historical grounds, but which nevertheless mars the symmetry of the analysis and definitions of contract which these writers give. Yet one would suppose that it should be accounted a merit, rather than a defect, in the law that it should provide two instruments instead of one to facilitate the creation of rights and duties by those desiring so to do. Is the craftsman to complain because he is given a choice of tools instead of being restricted to one tool only? The attitude of these writers seems to a large extent due to an attempt to force contract in English law into the strait-jacket of the analysis which continental writers, notably Savigny, have made of contract as it appears in the later Roman law and continental codes based upon that law. But if an analysis and definition of contract is to be offered in a text-book on the English law of contract that analysis and definition must be made in the light of the actual content of English law, not the Roman law or the law expounded by the modern civilians. Not that much valuable help is not to be derived from the work of the civilians; but that help must consist in suggesting our inquiries, not answering them. In this connection the words of Sir William Holdsworth (*History* (3rd ed.), vol. 3, 412) may be quoted: "In England Roman theories of contract never took root. Bracton's book shows us that they did not fit English facts; and after his time they ceased to influence the common law."

§ 9. Contract and Testament or Will

We must distinguish a unilateral declaration of intention expressed in the form of a deed and constituting a contract from a testament or will. A man may validly covenant that his personal representative shall pay a sum of money to a particular person (*d*); or he may execute a will containing a legacy of that sum to that person. The distinction between the deed and the will is that the will is revocable by the testator at his pleasure, and has no legal operation at all unless and until he dies without having revoked it (*e*), whereas the deed, once made, operates immediately in accordance with its terms (*f*). This does not mean that performance of the covenant can necessarily be immediately demanded. The terms of the deed may postpone the right of the covenantee to require or the duty of the covenantor to render performance. It means that there is immediately created a presently subsisting contractual obligation; nevertheless this obligation may not require or permit of performance until some future time as, for example, upon the death of the covenantor (*g*).

What shall be said, however, if a deed containing such a covenant reserves to the covenantor an absolute power of revocation? (*h*). Certainly the distinction between such a case and a will is a fine one. Nevertheless the better opinion appears to be that the difference remains that a will does not operate during the testator's lifetime, while a deed, even though revocable, operates immediately

(*d*) *Fletcher v. Fletcher* (1844), 4 Ha. 67; 67 E. R. 564

(*e*) *Beddington v. Baumann*, [1903] A. C. 13, 19

(*f*) *Cooper v. Martin* (1867), L. R. 3 Ch. 47; see especially *per Rolt*, L.J., 59.

(*g*) Cf. *Hochster v. De la Tour* (1853), 2 E. & B. 678; 118 E. R. 922.

(*h*) Authority on the validity of a term in a contract by deed purporting to reserve to the covenantor a power of revocation is meagre. It is certainly true that such a power could not be reserved in a common law conveyance whether by feoffment or deed of grant. *Co. Litt.* 237 *a*. This was not, however, because such a power of revocation was incompatible with the nature of a deed, but because it was incompatible with the common law conception of interests in property. Such interests were not revocable in their nature and any attempted reservation of a power of revocation in a conveyance operating at common law was therefore void for repugnancy to the interest conveyed: *ibid.* But where the deed dealt with a subject-matter to which the common law conception of the nature of interests in property was inapplicable a power of revocation could be effectively reserved. Thus where a deed contained dispositions operating under the Statute of Uses the reservation of a power to revoke those dispositions was valid: *ibid.*; *Sheppard's Touchstone*, 524-5.

If, then, the reservation of a power of revocation is not repugnant to the nature of a deed simply as such, that the deed is a contract would not seem to render such a reservation invalid. On the contrary, as the purpose of the law of contract is to give effect to the declared will of the parties the fact of the deed being a contract should help rather than hinder the validity of such a provision. Accordingly, in *Co. Litt.* 237 *a* it is said that a power of revocation may be validly reserved on a *covenant* to stand seised to uses; and this is repeated in the *Touchstone*, 524.

upon execution (i). The authorities, however, are not entirely clear on the matter. In *Fletcher v. Fletcher* (k), where a power of revocation had not been reserved, Wigram, V.-C., seems to have thought that reservation of such a power in an instrument whereby the maker purported to covenant that his personal representative would do something for the covenantee would constitute that instrument a will. On the other hand, in *Patch v. Shore* (l), where likewise there was no reservation of a power of revocation, Kindersley, V.-C., said: "The rule is that if an instrument be a deed in its form, in order to hold it is testamentary or in the nature of a will, there must be something very special in the case; it must even go to this extent, that it was the intention of the settlor that the instrument was to be ambulatory till his death, and then to operate at all events; or that he intended the instrument to be a will, *animo testandi*." Moreover, it is settled that a voluntary settlement in the form of a deed reserving a life interest to the settlor and containing a power of revocation is not testamentary. As Wood, B., said in *Att.-Gen. v. Jones* (m), "Then some stress has been laid on this, that one of the trusts is,—that it is given to the trustees for the use of the grantor during the term of his life; and that there is also a proviso of revocation, with a power of appointing new trustees. But all these things make no difference in respect to its being, or not being, a deed; if it had not had that power of revocation, it would have been absolute; but having it, it is equally a deed, only it has a power of revocation, which is an extremely common thing in instruments of this sort". But just as there could be no question that apart from the revocation clause the instrument in *Att.-Gen. v. Jones* was a deed and not a will, so there can be no question that a covenant by a man that his personal representative shall do something for the covenantee is not testamentary. And if the true view is that the addition of a power of revocation did not render the former testamentary, why should such an addition have that consequence in regard to the latter?

It is clear, indeed, that if an instrument contains an express

(i) See *Cooper v. Martin*, *ubi supra*; and *Butler and Baker's Case* (1591), 3 Co. Rep. 25a; 76 E. R. 684.

(k) (1844), 4 Ha. 67; 67 E. R. 564.

(l) (1862), 2 Dr. & Sm. 589, 598; 62 E. R. 743, 747.

(m) (1817), 3 Price 368, 385; 146 E. R. 291, 296. Wood, B., dissented; but the decision of the majority is not now recognised as law: *Brown v. Advocate-General* (1852), 1 Macq. 79, 85; Jarman, Wills (7th ed.), vol. 1, 36—37.

declaration that it is not to operate until the death of the maker, it will be regarded as testamentary even though in form a deed (n).

§ 10. Intention to Contract

Inasmuch as contract is a form of the declared will legally effective according to its tenor it follows that an element in that will must be an intention that it should be so effective. That is to say, an intention to contract must appear. Ordinarily this intention is not expressed but appears from the circumstances; and likewise the absence of it will generally have to be gathered from the circumstances rather than be the subject of express declaration. The common illustration of the case where the absence of an intention to contract appears from the circumstances is a social engagement—to dine with a friend, to go on a motoring tour with him, and the like (o). In *Balfour v. Balfour* (p) it was held by the Court of Appeal that an agreement between a husband and his wife pursuant to which the husband was to pay to his wife a weekly sum as a household allowance was of this non-contractual character. *Rose and Frank v. Crompton* (q), in the House of Lords, was a case in which there was an express direction that no contract was intended between the parties.

§ 11. Contract and Declaration of Trust

We have now considered most of the principal characteristics of contracts which enable us to distinguish contracts from other acts in the law. It still remains, however, to notice that contracts are creatures of the common law, for only on this historical ground can we distinguish certain contracts from certain declarations of trust (r). The trust was the great institution of equity; and although Courts of equity, following the law, recognised contracts and even provided certain contractual remedies of a kind unknown to the common law, the common law did not reciprocate and give its recognition to the trust.

Many declarations of trust in externals bear an exceedingly close resemblance to contracts. Thus, one person, being minded to make a gift to another, may covenant to assign the subject-matter of the

(n) *In the goods of Morgan* (1866), L. R. 1 P. & D. 214; *Foundling Hospital v. Crane*, [1911] 2 K. B. 367.

(o) See *per* Scrutton, L.J., in *Wyatt v. Kreglinger*, [1933] 1 K. B. 793, 806.

(p) [1919] 2 K. B. 571.

(q) [1925] A. C. 445; see also *Jones v. Vernon's Pools, Ltd.*, [1938] 2 A. E. R. 626.

(r) Maitland, *Equity* (2nd ed.), 54, 110—111.

intended gift to the other, thereby binding himself contractually. Or he may instead declare himself a trustee of the property for the other. And in neither case is it essential that the donee should know of the donor's action. Or to take examples where agreement is present. One person may contract with another to transfer shares to the other in consideration of a sum of money presently paid by the other; or he may, by way of agreement with the other, for the like consideration declare himself a trustee of the shares for that other. Nevertheless some obligations which may be imposed and undertaken by way of trust cannot be imposed or undertaken by way of contract. Thus at common law it is impossible for a person to undertake by way of contract an obligation to a person not yet in existence (s); yet an obligation to such a person may be undertaken by way of trust. Conversely many obligations which can be undertaken by way of contract cannot be undertaken by way of trust. Thus inasmuch as an essential element in a trust is the presence of trust property no obligation can be undertaken by way of trust unless it relates to property which could be the subject of a trust. Accordingly an obligation to render personal service could not be undertaken by way of trust.

It appears, therefore, that we have two separate sets of rules derived respectively from the common law and from equity, within either of which sets of rules certain transactions may be fitted; though by no means all transactions which could be fitted into one of these sets of rules could also be fitted into the other.

Where, then, the substantial purposes of a transaction might be effectuated either by way of contract or by way of trust, how do we decide which method has, in fact, been adopted? Entirely according to the intention in that behalf of the party or parties whose will constitutes the transaction. If the party or parties whose will must be regarded intended to declare a trust, the expression of will must be regarded as a declaration of trust; if the intention was to create a contract, the expression of will must be regarded as a contract (t). It should be added that where the transaction, if a contract, would be specifically enforceable, it will often be quite immaterial whether it is regarded as a contract or as a declaration of trust, for the practical result will be the same in either case (u).

(s) *Kelner v. Baxter* (1866), L. R. 2 C. P. 174.

(t) Cf. *Milroy v. Lord* (1862), 4 De G. F. & J. 264; 45 E. R. 1185; *Meek v. Kettlewell* (1843), 1 Ph. 342; 41 E. R. 662.

(u) Cf. *Maitland, Equity* (2nd ed.), 66 ff.

§ 12. Parties

Inasmuch as the conception of obligation is bilateral and all contracts have for their object the creation of obligations, there must be at least two parties to a contract (x). A man cannot be under an obligation to himself (y), and at common law even a covenant by a man with himself jointly with another or others is void (z). There may, of course, be more than two parties to a contract, but for simplicity's sake it is often convenient to speak as though contracts invariably involved only two parties.

§ 13. Definition

In the light of the foregoing discussion we may now venture upon a definition of a contract. A contract is either (i) a declaration of the will of a person or the combined declarations of the wills of several persons, creating and defining a non-testamentary common law obligation or obligations binding the declarant or declarants in favour of the person or persons indicated in that behalf in the declaration or declarations; or (ii) the combined declarations of the wills of several persons, which declarations coincide with each other in point of content and actually or constructively in point of time, and create and define a non-testamentary common law obligation or obligations between the several declarants.

§ 14. Express and Implied Contracts

Although we shall in this book use the term "contract" in the sense indicated in the last preceding section, it should be noticed that the classical meaning of the word in English law is more extensive than that appearing from our definition. What we have called a contract is merely one kind, although the most important kind, of contract in the classical sense. In this sense contracts are of two kinds, distinguished as express and implied. An implied contract is one the existence of which is implied by the law, although there is or may be no real contract in fact. It is a fictitious or constructive contract which the law chooses in certain cases for divers reasons, sufficient or insufficient, to attribute to the parties

(x) This must be read subject to the technical rules of the common law as to who are parties to deeds: pp. 382 *et seq.*, *post*

(y) *Grey v. Ellison* (1856), 1 Giff. 438; 65 E. R. 990.

(z) *Ellis v. Kerr*, [1910] 1 Ch. 529. S. 82, Law of Property Act, 1925, now provides that "Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone".

concerned, even though neither of them may have manifested or declared any intention of entering into such a contract. Because of its fictitious nature as a mere creation of the law, an implied contract is often called a quasi-contract—in imitation of the usage of the Roman lawyers who distinguished between *obligationes ex contractu* and *obligationes quasi ex contractu*. An express contract, on the other hand, is a real contract constituted by the actually declared will of one or both of the parties. It is to this kind of contract only that the term contract, without any qualifying addition, is applied in this book.

The terms *express* and *implied* as thus used to distinguish real contracts from quasi-contracts implied by the law are, unfortunately, misleading as suggesting a different meaning. It may be thought that an express contract is one expressed in words (written or oral), and that an implied contract is one in which the contractual intention of the parties is manifested by their conduct merely, without articulate expression—as when passengers enter a tramcar or other public conveyance and thereby tacitly agree to pay the fare, or when a purchaser takes a newspaper from a bookstall and thereby incurs a contractual obligation to pay for it (a). This, however, is not the proper and technical sense of the established distinction between express and implied contracts. An express contract means a real contract constituted by the actually declared will of one or both of the parties, whether expressed or manifested in words or in conduct. An implied contract is a contract fictitiously implied by the law, not a real contract which is left to be inferred from the conduct of the parties instead of from their words (b).

A contract so manifested by conduct only may be conveniently distinguished as a *tacit* contract, thus leaving the word “implied” free for exclusive use in its proper sense as meaning implied in law. A contract expressed in words may be distinguished as a verbal contract. A verbal contract may be expressed in words of speech or writing. In the former case it may be called an oral contract, in the latter a written contract.

Origins of Fictitious or Implied Contracts. By what motives is the law induced thus to recognise fictitious or implied contracts which have no existence in any actual declaration of the will of one or both of the parties? Why does the law falsely attribute con-

(a) Cf. Mantland, *Equity* (2nd ed.) 74. There is a similar ambiguity in regard to express and implied terms. See p. 36, *post*.

(b) Cf. *per* Scott, L.J., in *Re Cleadon Trust, Ltd.*, [1939] Ch. 286, 312 ff.

tractual intentions to persons who have no such intentions, and treat as contractual in origin obligations which have in reality a non-contractual source? This device is not based on any logical or rational grounds, but is an accident of the historical development of English law. If a complete and logical code of law were to be devised free from historical perversions, it would recognise no implied or quasi-contracts, but would attribute all non-contractual obligations to their true source, instead of to a fictitious source in a non-existent contract. The chief technical reasons for the recognition of implied contracts are two in number. In the first place, this device of treating as contractual certain obligations which are in truth non-contractual was adopted for the purpose of enforcing them by means of that form of action which was limited to contracts and which was more effective for this purpose than those older forms of action which were alone available for non-contractual obligations. The contractual form of action was that which was known as the action of *assumpsit*. The appropriate action, however, for the recovery of a debt, whether contractual in origin or not, was the older action of *debt*—a form of remedy which from the point of view of the plaintiff was subject to defects and difficulties from which the more modern and efficient remedy of *assumpsit* was exempt. It was, therefore, in order to allow the use of *assumpsit* instead of *debt*, that the law permitted a debt, although not really contractual in origin, to be sued for in the action of *assumpsit* by means of a fictitious allegation and implication that the debtor had promised to pay the debt. This was the origin of that variety of the action of *assumpsit* which was known as *indebitatus assumpsit*. The result was the establishment of the modern rule that in general all debts, whatever their true origin, are in law deemed to be contractual obligations. By a legal fiction they are treated as having their source in an implied contract between the debtor and creditor.

A second reason for the law's recognition of implied contracts is that this fiction, like all other legal fictions, served a useful purpose in enabling the law to develop new legal obligations by attributing them, however contrary to fact such attribution may have been, to the agreement of the parties. When a conservative system such as the common law sought to grow by the recognition of new legal obligations, it was much easier to attribute them to a recognised and familiar source—namely, contract—than to establish them *de novo* as resulting from the *ipse dixit* of the law itself. The real sources of newly-recognised obligations were justice, reason,

and public policy, but their nominal and professed source was contract. If A misappropriates the goods of B and sells them, the true obligation so created is a delictal obligation to pay damages for the injury so inflicted. But it is also just and proper that B, instead of claiming damages from A, should be allowed, in the alternative, to claim from him the money so obtained by him through the sale of the goods. Such a remedy would be in some cases more efficacious than a claim for damages. A legal system capable of developing freely without the aid of fictions would consequently have recognised in such cases a non-contractual obligation to refund the proceeds of the sale. But the common law found it necessary to take the road of fiction to this end. It permitted, and still permits, the owner of the goods to allege and sue upon a fictitious contract of agency, under which the wrongdoer is deemed to have sold the goods as the agent and on behalf of the true owner, and under which he is liable, like all other agents, to account for the proceeds of the sale to the principal. The plaintiff in such a case is permitted, as it is said, to *waive the tort*, and to sue on an implied contract instead (c).

So, taking another example, A, professing to act as the agent of B, but without authority, makes a contract in B's name with C. C cannot enforce this contract against B, because it was *ultra vires* of the agent by whom it was made. For the loss so sustained C has in justice a good claim against the agent A. This claim is in reality non-contractual, for there is not in truth any contract between A and C. But the law, as a convenient and effective method of recognising the existence of such a claim, treats it by a fiction as contractual. The law, that is to say, implies a contract between A and C whereby A warranted that he had sufficient authority from B to contract in his name and on his behalf (d).

So widely did this device of implied contract spread throughout the common law that all obligations to pay debts or damages were regarded as arising either out of contract or out of tort. If they were not *obligationes ex delicto* they were *obligationes ex contractu* (e). At the present day, however, when the forms of action have long since been abolished, we are at liberty to regard the substance of the matter, and need no longer classify as contractual

(c) See Salmond, *Torts* (10th ed.), 181 ff.

(d) *Collen v. Wright* (1857), 8 E. & B. 647; 120 E. R. 241. See pp. 418 *et seq.*, *post*.

(e) So, e.g., the precedents in Bullen & Leake, *Pleadings* (3rd ed., 1868), are classified under the two broad heads of contracts and wrongs respectively.

obligations which possess none of the characteristics of true contract (f).

§ 15. Validity and Operation of Contracts

Declarations of will intended to have contractual efficacy may in respect of their validity and operation as contracts be divided into four classes. They are either—(1) valid and enforceable; (2) valid but not enforceable; (3) void; (4) voidable.

Valid and Enforceable Contracts. A contract is said to be valid when it creates in favour of one party a legal obligation binding upon the other. It is said to be enforceable when the obligation so created is such that it can be enforced by action in a Court of law. A contract of the first kind—one which is both valid and enforceable—is therefore a perfectly operative contract—one which produces all the consequences that a contract can produce. It gives rise to both the essential elements—namely, *obligatio* and *actio*.

Valid but Unenforceable Contracts. But a contract of the second kind, valid but not enforceable, gives rise to an *obligatio* only without *actio*. The Roman lawyers called such an obligation *obligatio naturalis*. It may be thought that a legal obligation not enforceable by action cannot be a legal obligation at all. But this is not so. It may be operative in law for the production of all the other consequences of a legal obligation, save that of enforceability by action. If money, for example, is paid in pursuance of such an obligation, it cannot be recovered back as having been paid in mistake to one who was not legally entitled to it. So the surrender of such an *obligatio* may be a good consideration for another contract between the parties. So a security given for the performance of such an obligation would be valid and enforceable at law, although the obligation itself could not be sued on. An example of a contract which is valid but not enforceable is a contract which fails to conform to the Statute of Frauds, requiring certain kinds of contracts to be

(f) Indeed, to continue to classify our law according to the fictions of a bygone age is not only a barrier to logical and orderly exposition, but, even more important it may have a cramping effect on the development of the substance of the law. As an instance of this may be cited the way in which the question of the true basis of quasi-contractual liability tends to be confused by attempts to treat as matter of substance the fictions by which this head of liability was introduced into the law. Contrast Lord Wright's judgment, concurred in by the other members of the Court of Appeal in *Brooks Wharf and Bull Wharf, Ltd. v. Goodman*, [1937] 1 K. B. 534, 543-5, with the judgments delivered in the Court of Appeal in *Morgan v. Ashcroft*, [1938] 1 K. B. 49. See also the notable article by Lord Wright on *Sinclair v. Brougham* in 6 Camb. L. J. 305, reprinted in *Legal Essays and Addresses*, 1, and *Fibrosa v. Fairbairn, etc.*, [1943] A. C. 32.

evidenced by writing signed by the parties thereto. The statute does not say that such a contract shall be void or voidable; but merely that no action shall be brought thereon—that is to say, the statute takes away the *actio*, but leaves the *obligatio* otherwise unaffected (g). Another example is a contract which can no longer be enforced by action, because of lapse of time under the Limitation Act, 1939 (h).

Void Contracts. The third kind of contract is that which is *void*. In such a contract there is neither *obligatio* nor *actio*. It is wholly inoperative because of some initial defect in its constitution, or has become wholly inoperative because of some supervening defect (i).

Voidable Contracts. The fourth kind of contract is that which is *voidable*. It contains some defect in its constitution which, though it does not prevent an *obligatio* from arising, entitles one of the parties to put an end to the contract at his option. The act of so putting an end to a voidable contract is called rescission, and the party so destroying the contract is said to rescind it.

There is no legal impossibility in a contract being voidable, not merely at the election of one party, but at the election of either of them. Even in that case the obligation exists until one or other party chooses to put an end to it, and while so existing it may at any time become absolute and no longer voidable, because of some supervening act or event which takes away the right of rescission from one or both of the parties.

A voidable contract is to be distinguished from a contract which is merely determinable at the will of one of the parties. A continuing contract, such as one of service or partnership, continues either for a fixed and agreed period, or is determinable at the option of one of the parties, either with or without an agreed term of notice. Such a contract, though a party can at his option put an end to it, is not properly spoken of as voidable or as being rescinded. It does not come to a premature end by reason of any original or supervening defect, but determines naturally in accordance with the agreed provision as to its duration.

General Observations. Whether any ground of invalidity—any defect original in the constitution of a contract or thereafter supervening—has the effect of making the contract absolutely void, or

(g) See Williams, Statute of Frauds, 198 ff., and 50 L. Q. R. 592.

(h) See p. 613, *post*

(i) As a contract is a legally effective act in the law, to speak of a void contract involves a contradiction in terms. The convenience of the phrase may, however, excuse the logical defect.

only voidable, or only unenforceable, is a question to which no general reply can be given. This question must be answered separately for each individual kind of defect. Fraud, for example, makes a contract voidable; illegality makes it void; want of conformity with the Statute of Frauds makes it merely unenforceable.

A contract may belong to one of the four classes at one stage in its history and to another class at a later stage. It may be originally valid and enforceable, and may subsequently become void (e.g., by supervening frustration (*k*)), voidable (e.g., by breach (*l*)), or unenforceable (e.g., by operation of a Statute of Limitations (*m*)). It may be originally voidable (e.g., for misrepresentation) and become by a loss of the right of rescission fully valid (*n*). It may be originally unenforceable and yet become enforceable, as by the subsequent creation of written evidence of its terms (*o*). Being originally void, however, it may not, it seems, subsequently improve its position and become voidable, unenforceable or fully valid (*p*).

A contract may, as regards one party, belong to one of the three classes of fully valid, unenforceable and voidable contracts, and, as regards the other party, to another of them. Thus it may be voidable at the election of one party, though fully valid as against the other. So it may be enforceable at the suit of one party, but unenforceable at the suit of the other: as in the case of a contract under the Statute of Frauds, which is evidenced by writing signed by one party, but not by the other.

§ 16. Contracts and Choses in Action

A contractual right—the benefit of a contract—is one kind of those rights which are known in the technical language of English law by the awkward and unfortunate name of *choses in action*—that is to say, *things in action*. All other legal rights except choses in action are classed as choses or things *in possession* (*q*). This use of the term thing or its equivalent in other languages, such as *chose* and *res*, to denote a legal right is a familiar device of legal diction. It is the outcome of a figure of speech whereby the thing

(*k*) See pp. 526 *et seq.*, *post*.

(*l*) See p. 559, *post*.

(*m*) See p. 613, *post*.

(*n*) See pp. 272–5, *post*.

(*o*) See pp. 181–2, *post*.

(*p*) See *Shipp v. Kelly* (1926), 42 T. L. R. 258.

(*q*) As to the distinction between *choses in action* and *choses in possession*, see Salmond, *Jurisprudence* (7th ed.), ss. 88, 165, and the references given at p. 482 *ibid*.

which is the subject-matter of a right is identified by way of metonymy with the right itself. It is easier and simpler to speak of the thing in or to which we possess a legal right than to speak of the right itself. Consequently we are induced to formulate propositions which in terms relate to the subject-matter of the right, but which in truth and logic relate to the right itself. Thus we speak of owning land, whereas what is in truth owned is a particular kind of right in the land—namely, the fee simple thereof. So we call a creditor's right to receive payment from his debtor a *chose* or *thing* in action—speaking thereby of the money which he is entitled to receive instead of speaking of his right to receive it. When I have twenty shillings in my purse those shillings are a *chose* or *thing* in possession—namely, so much metal presently owned by me; but when I take them to a bank and pay them into my current account they are transmuted into a *chose* or *thing* in action—namely, the twenty shillings which the bank is now bound to pay me on demand in satisfaction of the debt so incurred by it (r).

Present Distinction between Choses in Action and Choses in Possession. In the usage of modern law—whatever may have been the case in earlier days—the distinction between choses in action and choses in possession must be regarded as connected with that between rights *in personam* and rights *in rem*, or, to use the language of Roman law, between *obligatio* and *dominium*. A chose in action is a proprietary right *in personam* or *obligatio*—the benefit of a *vinculum juris* created, whether by contract or in any other manner, between individual persons. A chose in possession is a proprietary right *in rem*—a right available against the world at large to the possession and enjoyment of some object of property or other beneficial interest. The shillings which I have in my pocket are choses in possession; they are mine by virtue of the right *in rem* or *dominium* which I have in them, and which is available against the world at large to help me to keep possession and to use them. But after I have deposited them with my banker—that is to say, lent them to him—I have merely a chose in action, *obligatio* not *dominium*, *jus in personam* not *jus in rem*. What I now possess is not a right available against all the world, but merely the benefit of the contractual *vinculum juris* which exists between myself and my banker, and by virtue of which I am entitled to demand and receive from him, and from him only, an equivalent number of shillings in satisfaction of his debt to me (s).

(r) *Foley v. Hill* (1848), 2 H. L. C. 28; 9 E. R. 1002.

(s) *Ibid.*

Why, then, do English lawyers call an *obligatio* or *jus in personam* (so far as it is proprietary) a chose in action, and *dominium* or *jus in rem* (so far as it is proprietary) a chose in possession? The reason is that in general the only remedy whereby the owner of such a chose in action can defend and enforce his right to it is an action in the law Courts, whereas in general the owner of a *jus in rem* has not merely this remedy by way of action against those who dispute his title, but has also the right to retain or take, even by force if need be, the possession of the thing to which he is thus entitled. He has the extra-judicial remedy of self-help, in addition to that judicial remedy by way of action in the Courts, which is the sole resource of the owner of a thing in action. My land and my horse and the money in my pocket are choses in possession, for I can defend my possession of them, by force if necessary, against all the world; and if they are taken from me wrongfully I can retake them even by force from the wrongdoer, and am not put to the sole remedy of a suit in the law Courts. But it is otherwise with a chose in action. Such rights lie in action exclusively. If my debtor refuses to pay me the money which he owes me, I am not entitled to take it from him compulsorily; I must seek for justice against him in the law Courts. If a vendor agrees to sell and deliver merchandise to me, and refuses to do so, my only remedy is to sue him for damages. My right is *jus in personam*, not *jus in rem*; *obligatio*, not *dominium*; a chose in action, not a chose in possession.

In the earlier days of English law this distinction was carried to its logical conclusion. Even *dominium* or *jus in rem* was classed as a chose in action in those exceptional cases in which ownership was not accompanied either by actual possession or by a right of taking possession. Even a man's own land was reduced in law to a chose in action when he had been wrongfully dispossessed of it under such circumstances that he possessed no right of retaking possession by way of re-entry, but was driven to the exclusive remedy of an action in the Courts for establishment of his title. In this state of the law the term chose in action included not merely all *obligationes* or *jura in personam*, but included *jura in rem* in certain circumstances. In modern law, however, there is no need to encumber and pervert our legal nomenclature by remembering this obsolete distinction. It is better to depart from ancient usage, and to regard the distinction between choses in action and choses in possession as exactly coincident with that between *obligatio* and *dominium*—between *jus in personam* and *jus in rem*.

In recent years the term chose in action has occasionally

been judicially recognised as including, not merely obligations, but also certain forms of incorporeal *dominium*, such as patents and copyrights. This extension, however, is not to be justified either historically or on principle. Patents, copyrights, trade marks, and other forms of immaterial property pertain to the sphere of *jura in rem*, side by side with the material ownership of land and goods. The distinction between choses in possession and choses in action is not identical with that between material and immaterial property, but is identical with that between real and personal rights.

Legal and Equitable Choses in Action. Choses in action are of two kinds, being either *legal* or *equitable*. A legal chose in action is one which is recoverable by an action at law as opposed to a suit in equity—one which has its source in the common law as opposed to equity—for example, a debt, or the benefit of a contract, or a right to recover damages for a tort. An equitable chose in action is one recoverable only by a suit in equity—for example, a claim by a beneficiary against his trustee or a claim by a legatee against an executor. The creditors of the estate of a testator possess a legal chose in action, but the legatees possess equitable choses in action. An annuity purchased by the annuitant from an insurance society is a legal chose in action, but an annuity payable by trustees out of a trust estate is an equitable chose in action.

An equitable chose in action must not be confused with the equitable ownership of a legal chose in action. Legal choses in action, like all other legal property, may be owned by one person at law and by another in equity, the legal owner being a trustee for the equitable owner. Shares, debentures, and mortgages are legal choses in action, and may be held by one person in trust for another. The equitable interest possessed by the beneficiary in such property is not an equitable chose in action, but is the equitable ownership of a legal chose in action (*t*).

Legal choses in action are of two kinds, being either contractual or non-contractual in origin. They are either *obligationes ex contractu* or *obligationes non ex contractu*. Most of them pertain to the first of these classes. Examples of the latter are rights of action for damages for torts, and all non-contractual debts, such as judgment debts and rights to recover money paid by mistake.

(*t*) Cf. Hanbury, *Modern Equity* (1st ed.), 54 ff.

CHAPTER II

THE TERMS OF A CONTRACT CONSIDERED IN
RESPECT OF THE MANNER IN WHICH
THEY ARE DECLARED

§ 17. Express and Implied Terms of the Contract

How does the declared will define and determine the contents of the obligation? It does this by declaring the terms of the contract. In speaking of the terms of a contract we sometimes mean the words in which it is expressed; as when we say that it is in vague terms, or that a certain interpretation of it is inconsistent with its terms. But at other times we mean by the terms of a contract the operative provisions declared or contained in it—the substantive contents of the declaration of will—as when we say that a certain act is a breach of one of the terms of the contract (a). The latter of these two uses of this expression is the more useful and convenient, and should be adhered to exclusively. Terms in the other sense are more appropriately spoken of as the words or expressions of the contract.

The positive or express statements in the declaration of will, however, will not necessarily amount in themselves to a complete definition of the obligation. There may be terms which are not positively stated in the declaration. Indeed, there may be terms which were not even present to the mind or minds of the party or parties whose declared will is the contract. Yet that declaration of will may nevertheless be said to define and determine the contents of the obligation. Those terms which are not expressly declared would not be imported into the contract at all if the express declaration of will had extended to the matters covered by them. *Expressum facit cessare tacitum*. Had the declaration spoken with legal effect (b) it could have excluded those terms; or introduced other terms either of the same or of a different content. By its silence, actual or legal, therefore, it has as much defined those aspects of the obligation comprised in these terms which are not expressly declared as by its positive statements it has defined those aspects of the obligation described in these statements.

(a) Lord Atkin uses the word in both of these senses in his judgment in *Bell v. Lever Bros., Ltd.*, [1932] A. C. at p. 225.

(b) Not, however, if the express term is legally ineffective, as, e.g., for being in undue restraint of trade: *Triplex Safety Glass Co. v. Scorah*, [1938] Ch. 211.

That part of the obligation which is positively stated in the declaration of will is described as *express*, and the positive or express statements in the declaration of will as the express term or terms of the contract. That part of the obligation which is founded in the silence of the declaration of will with regard to it is described as *implied* and its formulation as the implied term or terms of the contract. Implied terms are those which are implied by law and read into the contract as supplementary of the express terms thereof (c).

It is to be observed that obligations arising from the implied terms of a contract are clearly distinct from obligations of the voluntary status sort. In the case of the implied term the parties could, had they adverted to the matter and so desired, have dealt with its subject-matter by an express provision which might have departed to any extent from the implied term. But in the case of a status-obligation the parties may choose merely whether they will enter into it or remain free of it. If, however, they choose to enter into it they must take it as the law defines it. Its contents are not in any way susceptible of definition or modification by them.

§ 18. Justification of the Introduction of Implied Terms into Contracts

The action of the law in thus supplementing the declared will and attributing to it provisions which have not been expressed in it is explained and justified by the obvious fact that it is often impracticable for persons who undertake the business of making a contract to foresee every contingency that may arise in the contractual relationship and make express provision therefor in the terms of the contract. The complexity and uncertainty of human affairs would often render it impossible for persons to make an effective contract at all if the law imposed so great a burden upon

(c) Although implied terms which are contractual (*Medway Oil and Storage Co., Ltd. v. Silica Gel Corporation* (1928), 33 Com. Cas. 195, 196; *Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1934] A. C. 402, 423) could have been excluded by apt express provisions in the contract, it must not be supposed that, merely because a particular term could have been so excluded that term will necessarily be contractual. If, *e.g.*, all that could have been done would have been to exclude that term by substituting an express term securing the same object to the same or a greater degree, then up to the minimum thus demanded by the law the parties were still not free to define their obligation; and to this extent that obligation is still a status-obligation. An illustration is afforded by the Workmen's Compensation Act, 1925, which provides that within stringently defined limits employers and employees may by express contract adopt provisions for compensation other than and in lieu of those ordinarily implied under the Act. See ss. 1 (3) and 31. Implied terms which are truly contractual, however, might have been wholly excluded, or varied to any extent the parties pleased

them and refused to supplement their expressed consent with additional terms of its own devising. In many cases all that the parties can do is to declare the essence and main outlines of the contractual relationship proposed, leaving all *lācunæ* or *casus omissi* to be filled up or provided for by the wisdom and discretion of the law itself (*d*). The additions so made by the law to the express terms of a contract are the implied terms thereof. Two men make a contract of sale, and all they expressly agree upon is that such-and-such goods are to be sold and delivered on such a day and for such a price. But such an agreement is a poor provision for all the complications and contingencies that may exist in or arise out of the transaction. If this were the entire contract innumerable questions might arise between the parties to which their contract afforded no answer—questions as to which they had probably no intention at all, not having foreseen the case, and as to which they certainly have expressed no intention. But the law fills up the skeleton of this contract with flesh and blood, and transforms it into an effective instrument for the regulation of the relation so constituted between the parties. Most of the statute called the Sale of Goods Act consists of the formulation of the implied terms which the law will so read into contracts of sale by way of supplement to the express terms thereof. Similarly, when a merchant draws a bill of exchange, the express terms of the contract are contained in a score of words, but the implied terms which the law will add to it fill up the statute known as the Bills of Exchange Act.

The facility and effectiveness with which the law thus supplements and renders workable the skeleton outlines of express contracts is due to the circumstance that most contracts fall into recognised categories or types. Although contracting parties are in general at liberty to make any kind of contract that pleases them, they do in practice commonly content themselves with making contracts which fall within one or another of a limited number of specific and familiar classes. Most contracts are, to use the language of the civilians, *contractus nominati*, contracts with a known name and of an established and uniform type. *Contractus innominati*—nameless contracts of an indeterminate nature and produced *pro re nata*—are rare. A contract can in general be classed without difficulty as a sale of goods, or as a bill of exchange, or as a bill of lading, or as a marine insurance policy, or as a charter-party, or as a contract of agency, or of partnership or of some

(*d*) Cf. Corbin, 52 Harv. L. R. 419-20; Lord Wright, Legal Essays and Addresses, 259.

similar known type. The law, therefore, is enabled by way of anticipation to supply the necessary implied and supplementary terms for each such type of contract. A very large part of the law of contracts consists of nothing else than an anticipatory formulation of the implied terms that pertain to the several *contractus nominati* with which the law is familiar.

§ 19. Implied Terms Considered with Reference to Contractual Intention and Distinguished from Tacit Terms

The implied terms of a contract, meaning thereby the terms devised and implied by the law itself and imported into the contract as supplementary to the express terms which have their origin in the actual intention of the parties, must be distinguished from those terms inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. These latter terms may be described as *tacit* terms. It is regrettable that the word *implied* is ambiguous and is frequently applied not only to terms implied in law but also to terms implied in fact, *i.e.*, tacit terms (*e*). *Express* has a correspondingly ambiguous elasticity.

The usual way for a person to indicate his will in regard to a particular matter is by words spoken or written. But that is not the only way. He may to a certain extent be able to do so by other conduct than speaking or writing. Indeed, a complete contract may be made by such conduct, as when a purchaser takes a newspaper from a bookstall and thereby incurs an obligation to pay for it. In such cases the contractual intention or will is considered to be an actual fact inferable from the conduct of the persons concerned. Such cases, therefore, do not differ in essence from those where the intention or will is expressed in spoken or written words, for speaking and writing are themselves merely particular forms of human conduct. In both kinds of case the essential thing is that there is considered to be in the minds of the parties an actual intention or will manifested or declared by the parties by their overt acts, whether those acts take the form of written or spoken words, or other conduct. Both tacit and express terms are considered to represent the actual intention of the parties. Implied terms, on the other hand, are introduced by the law in default of the manifestation by the parties of any such actual intention, whether by speaking, writing or other conduct. It is precisely because the actual intentions manifested by the parties are insufficient to constitute a

(e) Cf the distinction, noted p. 24, *ante*, between implied and tacit contracts.

complete and workable contractual relationship between them that the law sets out to supplement those intentions by the addition of further terms—implied terms—to the contract. It may be, and doubtless frequently is, the case that an implied term does in fact correctly represent the latent unexpressed intentions of the parties. So far as possible the law frames its implications in such a manner as to produce this conformity. But the validity and operation of the implied terms in no way depend on any such conformity with actual and latent intention. The law will read its implied terms into the contract whether in fact there was any such intention on the part of the contracting parties or not, and even though it can be proved that they had no such intention (f).

Although implied terms are thus independent of any actual intention in the minds of the parties, they cannot conflict with the valid (g) express terms of the contract. They are essentially supplementary to those terms and cannot control or alter them. If in any contract there is a conflict between the valid (g) express terms thereof and the implied terms which the law would otherwise read into it, the implied terms are to that extent excluded. In other words, implied terms are not imported into a contract where a contrary intention has been validly (g) expressed in the contract by the parties.

Although implied terms are thus and to this extent independent of the actual intention of the contracting parties they nevertheless profess to be based on that intention. In adding implied terms to a contract the law does not profess to be acting without regard to the real intention of the parties, but professes to be ascertaining that intention by a process of interpretation. An express term represents an intention actually possessed and declared by the contracting parties; an implied term represents an intention which they are deemed by the law to have possessed and which is added by the law to the express contract accordingly.

§ 20. Terms Implied by Reference to (a) a General Rule of Law as to a Class of Contracts, or (b) Express Terms of Particular Contract

Viewed with reference to their sources and the modes of their implication, implied terms are of two kinds. One kind consists of those terms which are read into a contract by reason of some general rule of law applicable to contracts of that class. The other kind

(f) See *Triplex Safety Glass Co. v. Scorah*, [1938] Ch. 211, and *Maritime National Fish Co. v. Ocean Trawlers*, [1935] A. C. 524.

(g) *Triplex Safety Glass Co. v. Scorah*, *supra*.

consists of terms which are read into a contract not by virtue of any such general rule, but by way of interpretation of the express terms of the individual contract. In both cases the ostensible process is one of interpretation merely. In both cases the law professes to be ascertaining the intention of the parties, although it attributes to them intentions which in fact they did not possess. But the process of interpretation is different in the two cases. In the first case the law applies some pre-established general rule; a rule that all contracts of a certain class are to be read and interpreted as containing such-and-such an implied undertaking or condition in addition to the undertakings and conditions expressed therein, so long as there is nothing expressed to the contrary. In the second case the law relies on no such general rule of interpretation, but undertakes *pro re nata* the task of ostensibly interpreting the express terms of an individual contract (*h*). But this process of ostensible interpretation, in effect, supplements these express terms by adding terms which are not in truth to be found on the face of the contract (*i*).

Terms Implied by General Rules of Law. Implied terms read into contracts by reason of general rules of law applicable to all contracts of that class are to be found in most contracts for the sale of goods. The Sale of Goods Act, 1893, consists, to a large extent, of the formulation of terms which are to be implied in contracts for the sale of goods in the absence of any express contrary direction. Similar provisions are contained in the Bills of Exchange Act, 1882, the Partnership Act, 1890, and the Marine Insurance Act, 1906, con-

(*h*) Cf. *per* Lord Wright in *Luxor, Ltd. v. Cooper*, [1941] A. C. 108, 137.

(*i*) This double process of interpretation—general and specific—whereby the law, while professing merely to interpret a document, draws more out of it than the parties ever put into it, is not peculiar to the law of contracts. The most important and familiar instance of it is the interpretation of statutes. The Courts profess to be merely ascertaining the intention of the Legislature as expressed in the *verba legis*. But the intention of the Legislature as so expressed is apt to show the same imperfections and deficiencies as the expressed intention of contracting parties. When any difficulty of statutory interpretation arises, the truth of the matter probably is that the Legislature had no intention at all in the matter—the case being a *casus omissus* not present to the mind of the Legislature. Therefore the intention so attributed to the Legislature in the process of statutory interpretation is largely a merely constructive or fictitious intention, like that which the law attributes to contracting parties in interpreting their contracts. The law is compelled by the necessities of the case to attribute implied intentions to the Legislature, just as it attributes implied intentions to the parties to a contract. In interpreting a statute, as in interpreting a contract, the law proceeds in a double manner. Sometimes it applies general and pre-established rules of interpretation, such as those to be found in the Interpretation Act. At other times, no such general rules being applicable, the law bases its interpretation exclusively on the words of the particular statute under consideration. Cf. B. A. Wortley in *Modern Theories of Law* (1933), pp 150–152.

cerning contracts falling within the scope of these Acts. In similar fashion terms are implied in certain classes of contracts by virtue of the common law in its uncoded form. Thus every contract for the carriage of goods at sea to which the Carriage of Goods by Sea Act, 1924, does not apply, contains, in the absence of an express contrary provision, an implied term to the effect that the ship is seaworthy (*k*). Similarly contracts of guarantee ordinarily contain an implied term providing that the guaranteed creditor will not, by giving further time to the debtor or in any other manner, increase the risk assumed by the guarantor (*l*). In the same way there will, if necessary, be implied in contracts of personal service terms relative to the effect of illness or death on the rights and obligations of the parties (*m*). By a further important rule of the common law every mercantile contract is presumed to be made on the basis of the established mercantile usages in the particular market, and all such usages are read into the contract as implied terms thereof so far as not inconsistent with the express terms (*n*).

Implied Terms Derived by Necessary Implication. We pass now from those implied terms which are thus read into a contract by reason of general rules of law applicable to all contracts of that class to those other implied terms which are merely the product of the interpretation of the express terms of the individual contract. The rule is that there will be read into every contract such implied terms as are derivable by necessary implication from the express terms of that contract, read in the light of the subject-matter and purpose of the contract and the circumstances in which it is made. By necessary implication is not meant a necessary inference of fact as to the actual intention of the parties. Implied terms are read into a contract for the very reason that there is no sufficient express intention and probably not even a sufficient actual intention. The very purpose of implied terms is to supplement the defective actual

(*k*) Scrutton, *Charterparties and Bills of Lading* (14th ed.), 99.

(*l*) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755, 763.

(*m*) *Boast v. Firth* (1868), L. R. 4 C. P. 1; *Taylor v. Caldwell* (1863), 3 B. & S. 826, 835; 122 E. R. 309, 313; *Marrison v. Bell*, [1939] 2 K. B. 187; *Petrie v. Mac-Fisheries, Ltd.*, [1940] 1 K. B. 258; *Hancock v. B.S.A. Tools, Ltd.*, [1939] 4 A. E. R. 538; *Southern Foundries v. Shirlaw*, [1910] A. C. 701, 721; cf. *O'Grady v. M. Saper, Ltd.*, [1910] 2 K. B. 469; so also in *Robb v. Green*, [1895] 2 Q. B. 315, it was held to be an implied term of a contract of service that the servant undertakes to serve his master "with good faith and fidelity".

(*n*) *Bayliffe v. Butterworth* (1817), 1 Ex. 425; 154 E. R. 181; *Produce Brokers Co., Ltd. v. Olympia Oil and Coke Co., Ltd.*, [1916] 1 A. C. 314. Cf. Lord Wright's dictum in *Hillas & Co., Ltd. v. Arcos, Ltd.* (1932), 147 L. T. 503, 517, as to "the legal implication in contracts of what is reasonable, which runs throughout the whole of the modern English law in relation to business contracts". See also *Forres v. Scottish Flax Co., Ltd.*, [1943] 2 A. E. R. 366.

intention of the parties by filling up *lacunæ* and making the necessary provision for *casus omissi*. By necessary implication is meant such an implication as is necessary to give efficacy to the contract by so supplementing its express terms as to make it a workable and complete agreement in such manner as the parties would presumably have themselves adopted had the question been brought to their minds and been made the subject of express provision at the time when the contract was made. The law attributes to parties by this process of interpretation the intention which as reasonable men they must necessarily have formed and expressed on the making of the contract if the matter had then been called to their attention. The intention so attributable to them is imported into the contract by the law as an implied term thereof. In *Dahl v. Nelson* (o) Lord Watson expresses this principle in the following words: "There may be many possibilities within the contemplation of the contract . . . which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties as fair and reasonable men would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence". So in *The Moorcock* (p) Bowen, L.J., says: "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction. . . . I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have" (q).

Thus in *Behn v. Burness* (r) it was agreed by charterparty that the plaintiff's ship, described in the contract as "now in the Port of

(o) (1881), 6 App. Cas. 38, 59.

(p) (1889), 14 P. D. 64, 68

(q) See also *Broome v. Pardess Co-op. Soc.*, [1940] 1 A. E. R. 603; cf. *per MacKinnon, L.J.*, in *Shirlaw v. Southern Foundries (1926), Ltd.*, [1939] 2 K. B. 206, 227

(r) (1863), 3 B. & S 751; 122 E. R. 281.

Amsterdam", should go to an English port and there load a cargo of coal to be provided by the defendant. The ship was not in port at Amsterdam at the date of the contract, and it was held that for this reason the defendant was entitled to rescind the contract. The words "now in the Port of Amsterdam" were construed as meaning "if now in the Port of Amsterdam", the ground of this interpretation being the presumed, though unexpressed, intention of the parties having regard to the nature and purpose of such a contract. In fact, they had probably no intention in the matter at all. They assumed that the ship was in the port of Amsterdam; the possibility that she might not be was presumably not present to their minds, and they made no provision in the charterparty as to what was to be the legal position in that event. But the law supplied the defects of the actual intention by importing into the charterparty a term not expressed therein, but drawn by necessary implication from the words of the contract read in the light of its purposes. The law read the charterparty as saying that which it presumed the charterparty would have said if the possibility of the actual event had been present to the minds of the parties. So in *Krell v. Henry* (s) the defendant, being desirous of viewing the Coronation procession of King Edward VII, agreed to hire from the plaintiff for the day on which the procession was announced to take place certain rooms from which it could be viewed. The contract was in writing, and the document contained no mention of the purpose for which the rooms were hired. Owing to the illness of the King the procession was postponed and did not take place on the day for which the defendant had hired the rooms. He rescinded the contract accordingly and refused to pay the agreed price. It was held that the contract contained an implied term to the effect that the defendant should not be required to take the rooms if the Coronation was postponed from the appointed day; and hence that he was not liable. It cannot reasonably be supposed that the parties had any real intention as to this event at all. But it was a necessary implication, having regard to the known purpose of the contract, that if the possibility of a postponement of the Coronation had been adverted to on the making of the contract the parties would have agreed that in that event the contract should be cancelled. A term to that effect was therefore read into the contract by the law. It is noticeable from this example that the implication of implied terms is not based exclusively on the words of the contract, but may be derived from the purposes and circumstances of the contract as proved

(s) [1903] 2 K. B. 740.

aliunde. The contract in question in *Krell v. Henry* was in writing and made no mention of the Coronation. Yet a term relative to the taking place of the Coronation on the due date was by implication imported into the contract (t).

Inasmuch as the implication of a term in such cases is based on the assumption that the parties would necessarily have adopted that term had the matter been called to their attention when they were making the contract, it follows that no such implication will be made if it be shown that the parties did advert to the matter and nevertheless refrained from making any provision with respect to it (u).

Whether an implied term is to be read into a contract is a question of law for the Judge and not of fact for the jury (x).

(t) A further illustration of the general principle of necessary implication is afforded by the well-known *dictum* of Cockburn, C.J., in *Stirling v. Maitland* (1864), 5 B. & S. 841, 852, 122 E. R. 1043, 1047: "if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative" See *Southern Foundries v. Shirlaw*, [1940] A. C. 701

(u) See p. 514, n. (n), *post*

(x) *Hall v. Brooklands Auto Racing Club*, [1933] 1 K. B. 205, 213, 222.

CHAPTER III

THE TERMS OF A CONTRACT CONSIDERED IN
RESPECT OF THEIR CONTENTS§ 21. Classification of the Terms of a Contract by Reference
to Content

Inasmuch as a contract consists of the declared will of the obligor or the concurring declared wills of the obligor and the obligee creating and defining the contractual obligation, the nature and extent of that obligation must be sought in the declaration of will. That is to say, it must be sought in the terms, express or implied, of the contract.

Undertakings and Conditions. The terms or operative provisions of a contract are of two kinds, which may be distinguished as undertakings and conditions. Undertakings are terms which either directly or indirectly specify the acts or forbearances which the contract entitles the obligee to require of the obligor in virtue of the contractual obligation (a). Conditions are the terms which specify the contingencies (if any) upon which the obligee's right to require those acts or forbearances is to depend. In other words, they are the terms which specify the contingencies upon which the obligee may require of the obligor performance of the obligation (b). Every contract contains terms of the first kind, for without an undertaking and an obligation created thereby there could be no contract at all. Most contracts contain terms of the second kind also. The undertakings and obligations of a contract may, indeed, be absolute (c), but they are commonly subject to express or implied conditions on which their operation or continuing operation depends. Thus in a contract of sale the buyer undertakes to accept and pay

(a) The use of undertaking in this sense is expressive and convenient, although the word can scarcely be said to convey in professional speech the suggestion of technical significance which marks such words as condition and warranty. Nevertheless it is no stranger in judicial discussion. See, e.g., *per* Lord Ellenborough, C.J. in *Wain v. Warlters* (1804), 5 East 10, 17; 102 E. R. 972, 975, and *per* Erle, C.J. in *Bannerman v. White* (1861), 10 C. B. (N.S.) 844, 860; 142 E. R. 685, 691.

(b) "The term 'condition' as applied to contracts appears to mean indifferently (a) an uncertain event on the happening of which the obligation of the contract is to depend, and (b) the stipulation in the contract making its obligation depend on the happening of the event." Chalmers, *Sale of Goods* (10th ed.), 191. See also Halsbury, *Laws of England* (2nd ed.), vol. 7, p. 220.

(c) E.g., *Taylor v. Webb*, [1937] 2 K. B. 283, 289—290.

for the goods; but (unless the contrary be agreed (d)) this undertaking is subject to the condition that they are delivered to him in accordance with the contract (e). So also in a contract of personal service for a certain time the undertaking of the servant to render the specified service is subject to the implied conditions that he remains alive (f) and is not disabled by sickness (g).

Of course, where an act in the law is not a pure contract but partly a contract and partly a conveyance, grant or surrender (h) it will, in virtue of this non-contractual element, contain terms which are neither undertakings nor conditions. A contract for the sale of goods, for example, may be, and often is, not a pure contract, but one having superadded thereto a conveyance—namely, a term, express or implied, which operates to vest the ownership of the goods in the buyer forthwith without delivery (i). But a contract of sale which does not so vest the ownership of the goods in the buyer forthwith, but merely imposes upon the seller an obligation to deliver them and thereby to vest the ownership in the buyer, is a pure contract consisting exclusively of obligations and the conditions attached thereto (j). Whenever we find what is alleged to be a contract containing terms which are neither undertakings nor conditions, the reason is that it is not a contract pure and simple, but is a contract containing superadded elements pertaining to other types of acts in the law.

Promises and Warranties. Contractual undertakings, as opposed to contractual conditions, are themselves of two kinds, distinguished as promises and warranties. A promise is a term whereby a party to the contract undertakes to do a certain act. A warranty is a term whereby he undertakes that a certain fact exists, or that a certain event has occurred or will occur. A promise is a contractual undertaking as to the future acts of him who makes it; a warranty is a contractual undertaking as to any other fact or event whatever. If a seller undertakes to sell and deliver “one ton of potatoes of

(d) *Calcutta Co. v. De Mattos* (1863), 32 L. J. Q. B. 322, 328; s. 55, Sale of Goods Act, 1893.

(e) S. 27, Sale of Goods Act, 1893.

(f) *Taylor v. Caldwell* (1863), 3 B. & S. 826, 835; 122 E. R. 309, 313.

(g) *Boast v. Firth* (1868), L. R. 4 C. P. 1.

(h) See pp 6 *et seq.*, *ante*.

(i) S. 1, Sale of Goods Act, 1893.

(j) Thus a contract for the sale of unascertained goods under which the seller is required to make delivery at a particular place does not, unless a different intention appears, pass the property in the goods until they are delivered at the specified place. *Ridgway v. Ward* (1884), 14 Q. B. D. 110, 119; *Badische, etc., Fabrik v. Basle Chemical Works*, [1898] A. C. 200, 207; *Colley v. Overseas Exporters*, [1921] 3 K B 302.

merchantable quality", his undertaking is a promise, for it relates to his own future acts. If he delivers no potatoes, or if those which he does deliver are not of merchantable quality, his breach of contract is a breach of promise, and not a breach of warranty. If, on the other hand, he undertakes to sell and deliver "this sack of potatoes", and also undertakes that the potatoes in the sack are of merchantable quality, he has entered into two undertakings, one of them being a promise and the other a warranty. If he fails to deliver the sack of potatoes, he has broken his contract by breaking his promise; but if the potatoes contained in the sack delivered by him are not of merchantable quality, he has broken his contract by breaking the warranty. For he did not promise to deliver merchantable potatoes; he promised to deliver certain specific potatoes identified at the time of the contract as contained in a certain sack. This promise he has performed, however bad the quality of the potatoes may be. But if they are bad potatoes, he has broken another undertaking which he made at the same time as his promise—namely, that those specified and identified potatoes were in fact of good quality. This is an undertaking as to an existing fact, and not as to any future act to be done by him (*k*).

We have said that both promises and warranties are undertakings. That a promise is an undertaking is apparent, for it directly specifies the acts or forbearances which may be required of the party giving it. But how is a warranty to be brought under this head? Directly or expressly it does not specify anything which the person giving it can be required to do or refrain from doing. Indirectly and impliedly, however, it does specify an act which may be required of him in a certain event, *viz.*, payment of damages if his direct undertaking should be broken. It is in virtue of this indirect aspect that a warranty is to be classed as an undertaking.

It is, indeed, obvious that, if we disregard the language in which a warranty is expressed and look beyond that language to the essential nature of the transaction, a warranty is in truth merely a special and peculiar form of promise. An undertaking by way of warranty that a certain fact exists is in truth and substance a promise to pay damages if it does not exist—damages which are to be measured by the pecuniary interest of the other party in the fulfilment of the warranty. He who warrants a horse to be sound does in truth and in fact promise that, if it is not sound, he will

(*k*) Cf. *Hesbut, Symons & Co. v. Buchleton*, [1913] A. C. 30. 38, 42—43. 49. *De Lassalle v. Guildford*, [1901] 2 K. B. 215, 220—221; *Otto v. Bolton*, [1936] 2 K. B. 46, 50; *Leake, Contracts* (7th ed.), 4, 269; *Story, Contracts* (5th ed.), 255 ff.; *Anson, Contracts* (17th ed.), 366. *Chalmers, Sale of Goods* (10th ed.), 192.

pay to the purchaser by way of damages any deficiency in value caused by its unsoundness (l). It is in this promissory obligation to pay damages that the contractual obligation of a warranty consists. But although this is so, there remains a real difference between the kind of promise which is thus involved in a warranty and the ordinary kind of promise which is contrasted with a warranty. A promise, as opposed to a warranty, creates two distinct obligations—first, an obligation to do the act promised; and secondly, an obligation to pay damages if it is not done. But a warranty creates only one obligation—namely, that of paying damages if the warranty is broken. In the case of a promise the obligation to pay damages is secondary and accessory to the primary obligation to fulfil the promise. But in the case of a warranty the obligation to pay damages is itself the primary and only obligation so created.

It may be suggested that even so the distinction between a warranty and a promise is not one of substance, but is merely one of form, inasmuch as even in the case of a promise the only real obligation thereby created is an obligation to pay damages for the breach of it. In other words, it may be suggested that a promise is itself a mere warranty that the act promised will actually be done—that is to say, an undertaking to pay damages if it is not done. But this is not the true nature and effect of a promise as distinguished from a warranty. The primary obligation to do the act promised is distinct from the secondary obligation to pay damages for non-performance, and has distinct legal consequences of its own. A contractual obligation to do an act is not rightly regarded as a mere undertaking to pay damages if it is not done, for it creates a presently operative legal duty to do that act. This duty may be enforced in proper cases by an injunction or by a decree of specific performance, whereby the promisor is compelled under pain of imprisonment to do the very act promised by him. He is not entitled at his option to pay damages instead. Moreover, the breach of a promissory undertaking is in itself a wrongful and illegal act, and is treated as such for many purposes of the law (m). He who breaks his promise cannot justify himself in the eyes of the law by pleading that his real promise was merely to pay damages in the event of his failing to perform the contract, and that he may lawfully elect not to perform it and to pay damages instead. He who pays damages for the breach of a promissory undertaking is not

(l) Cf. Holmes, *Common Law* (1882 ed.) 298 ff.

(m) *Allen v. Flood*, [1898] A. C. 1, 96, 122—123; *Angullia v. Estate and Trust Agencies* (1927), *Ltd.*, [1938] A. C. 624, 635.

regarded by the law as performing his contractual obligations; he is regarded as submitting to a legal liability which results from the breach of those obligations.

But in the case of an undertaking by way of warranty it is otherwise. There is here in truth no promise except a promise to pay damages in a certain event. The breach of a warranty is a breach of contract, but it is not a breach of any legal obligation. The only obligation is one to pay damages for the breach. Doubtless a party to a contract could, if he chose to do so, warrant his own future acts instead of promising them. In lieu of promising to do an act he might merely warrant that the act would be done—that is to say, he might promise merely to pay damages if he did not choose to do it. But such a warranty of his own acts would produce different legal effects from a promise to perform them. He would be under no duty to do the act and would commit no wrong by refusing.

Although we have thus distinguished between a promise and a warranty it should be noticed that promise is nevertheless frequently employed in a broad sense to cover both kinds of undertaking (n). Promise and its derivatives promisor and promisee will generally be used in the broad sense in this book where the distinction between promise *stricto sensu* and warranty is not material.

§ 22. Conditions

As already indicated (o), a condition is a contractual term, expressed or implied, whereby the operation of an undertaking contained in the contract is made dependent on the issue of some contingency. If the contract consists of more undertakings and obligations than one a condition may be imposed upon the whole of those undertakings and obligations or it may be limited to some one or more of them. In other words, a condition may make the contract wholly conditional or conditional in part only, the residue of the obligations of that contract being absolute so far as that condition is concerned. An example of the former position is a contract for the sale of specific goods not, at the time of the making of the contract, known to the parties to have perished: such a contract is conditional upon the goods being in existence when it was made (p). An example of the latter position is afforded by a contract for the sale and purchase of goods in instalments: the

(n) See pp. 6-7, *ante*.

(o) See p. 43, *ante*

(p) S. 6, Sale of Goods Act, 1893; cf. *Scott v. Coulson*, [1903] 2 Ch 249.

obligation of the vendor to deliver any particular instalment is (in the absence of a term to the contrary) conditional on the readiness and willingness of the purchaser to pay for that instalment (q). Non-payment by the purchaser of the price of an instalment which was nevertheless delivered to him would not (so far as this condition was concerned) entitle the vendor to withhold delivery of a subsequent instalment (r).

A condition may relate either to the existence of some fact at the date of the making of the contract or to the happening of some event subsequent to that date. In other words, a condition may be either *de præsenti* or *de futuro*. The formula of a condition of the first kind is: "I promise performance of this undertaking if such-and-such a fact now exists". The formula of a condition of the second kind is: "I promise performance if such-and-such an event takes place". Thus: "I agree to purchase this stone for £100 if it is a genuine diamond" is a promise subject to a condition *de præsenti*. If the stone is in fact a diamond the promise to accept and pay for it is absolute, but if it is in fact an imitation the promise is not binding. On the other hand, "I agree to purchase this horse for £100 if it is still alive and in good condition in one month from now" is a promise subject to a condition *de futuro*. If the horse is alive and well at the end of the month the obligation to accept and pay for it becomes absolute. If the issue is otherwise the obligation is not binding. The future event so specified in a condition may be and often is the doing of some act by the other party to the contract, and this act may or may not be the performance of some obligation on his part.

The contingency which is the essence of a condition must be distinguished from mere futurity (s). An obligation is not to be classed as conditional because its performance is not yet due. The passage of time is a certainty and not a contingency (t). In order to be presently enforceable an obligation must fulfil two requirements. In the first place, it must be or have become *absolute*—that is to say, all conditions precedent must be fulfilled. In the second place, it must be or have become *due*—that is to say, it must be or have become a present and not a merely future obligation. If it is still conditional, or still future, or still both conditional and

(q) S. 28, Sale of Goods Act, 1893.

(r) *Steinberger v. Atkinson & Co.* (1914), 31 T. L. R. 110; for another illustration see *Kawasaki Kisen Kaishiki Kaisha v. Bantam Steamship Co.*, [1938] 1 K. B. 805, affirmed by C. A., [1938] 2 K. B. 790.

(s) Lord Wright in *Luxor, Ltd. v. Cooper*, [1941] A. C. 108, 136.

(t) So also Pollock, *Contract* (11th ed.), 225; Halsbury, *Laws of England* (2nd ed.), vol. 7, 220; *contra*, Leake, *Contracts* (7th ed.), 464.

future, it cannot yet be exacted or enforced. The Roman lawyers expressed this principle by saying of an obligation which was still conditional, *dies non cessit*; and of an obligation which was still future, *dies non venit*.

The same term in a contract may be both an undertaking and a condition; that is to say, the fulfilment of the undertaking may be also a condition of the reciprocal undertakings and obligations of the other party. In other words, the breach of an undertaking may be also the breach or failure of a condition (*u*). This is so whether the undertaking is a promise or a warranty (*w*). On the other hand, many promissory undertakings or warranties are not also conditions, and many conditions are not also undertakings. A condition may relate to something else than the fulfilment of a promise or a warranty (*x*); and a promise or warranty is not necessarily such that a breach of it amounts also to a breach of a condition of the contract. The reciprocal obligations of the contracting parties may be independent and not operative as conditions also (*y*).

§ 23. Conditions Precedent and Subsequent

Conditions are sometimes divided into conditions precedent and conditions subsequent or resolute, a condition precedent being defined as a condition attaching to the creation of an obligation, and a condition subsequent or resolute as a condition attaching to the destruction of an obligation. In the law of contracts this distinction is (except for one purpose) not one of substance, but merely one of form: a condition subsequent or resolute is merely a condition precedent reversed in its expression.

Compare the two following examples of a condition and undertaking: (1) "I promise to pay you £1,000 in five years if I live so

(*u*) *E.g.*, *Welch v. Royal Exchange Assurance*, [1938] 1 K. B. 757; affirmed by C. A., [1939] 1 K. B. 294.

(*w*) In the Sale of Goods Act, 1893, warranty is defined (s. 62 (1)) as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated". It will be noticed that this definition is both wider and narrower than that which has been adopted in the text. It is wider because it may include not only warranties as we have defined them, but also promises in our sense. It is narrower because it excludes all warranties (as we have defined them) which are also conditions.

(*x*) *E.g.*, *Kawasaki Kisen Kaisha v. Bantam Steamship Co.*, [1939] 2 K. B. 544.

(*y*) *E.g.*, *Taylor v. Webb*, [1937] 2 K. B. 283, 289—290; *Leiston Gas Co v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Marrison v. Bell*, [1939] 2 K. B. 187; cf. *Petrie v. MacFisheries, Ltd.*, [1940] 1 K. B. 258. See notes to *Pordage v. Cole* (1607), 1 Wms. Saund. 319; 85 E. R. 449, and notes to *Cutter v. Powell* (1795), 6 T. R. 320; 101 E. R. 573, in 2 Smith's Leading Cases (13th ed), 9 ff.

long"; (2) "I promise to pay you £1,000 in five years, provided that if I die before that date this obligation is to be void". The condition in the first example is a condition precedent, that in the second example a condition subsequent or resolutive. But there is obviously no essential difference in their real meaning. Living for five years and dying before the expiry of five years are merely the two alternative issues of the same contingency. Any condition whatever might be expressed in the form of a condition resolutive, but it would not thereby differ in effect from the same condition expressed in the form of a condition precedent. Sometimes the one form of expression is more convenient and sometimes the other. The form of a condition precedent is more commonly used than that of a condition subsequent. A notable example of a condition subsequent or resolutive is a conditional bond. Such a bond begins by imposing what purports to be an absolute obligation to pay a certain sum of money, called the penalty of the bond. It then proceeds to qualify this obligation by attaching to it a condition subsequent or resolutive in the following formula: "Now the condition of this bond is that if such-and-such an event happens then this bond shall be void and of none effect but otherwise shall remain in full force and effect". It is clear that exactly the same effect could be produced by providing for the opposite event in the form of a condition precedent.

Although, however, the form in which a condition is expressed is in general of no more than verbal significance, it is otherwise when the question is upon whom rests the burden of proof in respect of the fulfilment of the condition. It seems that in the case of a condition precedent it is for the obligee to show that the condition has been fulfilled, but in the case of a condition subsequent the burden of showing fulfilment is upon the obligor (2). In other words, if a contingency is expressed as a condition precedent the plaintiff seeking to enforce the obligation will fail unless he shows that the obligation has become absolute by the fulfilment of the condition, whereas if the contingency is expressed as a condition subsequent he will succeed (other things being equal) unless the defendant shows that the obligation has been discharged by the fulfilment of the condition.

(2) *The Glendarroch*, [1894] P. 226; *Munro Brice & Co. v. War Risks Association*, [1918] 2 K. B. 78 (reversed on facts, [1920] 3 K. B. 94); *Stoney v. Eastbourne R. C.*, [1927] 1 Ch. 367, 377; *Morison, Rescission of Contracts* (1916), 33.

§ 24. Pendency and Determination of Condition

A condition may be pending, or be determined by fulfilment, failure or waiver.

The existence of the fact or the happening of the event specified in a condition is called the fulfilment or performance of the condition. The term fulfilment is of general application in this connection, whereas the term performance is appropriate only when a condition relates to some act to be done by the other party.

The condition, instead of being fulfilled, or failing, may, if it is not such as to operate *ipso jure* but only on the option of the party bound by the obligation (a), be waived by that party. Waiver, in such cases, consists in some act done by that party whereby he is precluded from relying on the condition or the failure of it. The waiver of conditions occurs in several ways. Thus a condition is waived as soon as the party to whose undertaking it is attached elects not to take advantage of it but to confirm the obligation arising from his undertaking. After such an election he can never afterwards change his mind and take advantage of the condition or breach thereof so waived by him. Thus in a contract for the sale of goods by description there is implied (in the absence of any stipulation to the contrary) a condition that the goods shall correspond with that description (b), and if a buyer under such a contract chooses to accept goods which are not in conformity with the contractual description he cannot afterwards reject them for this breach of condition. His remedy is now limited to an action for damages for the seller's breach of contract (c). Waiver may also take place not by way of election but by way of estoppel. The party bound by the conditional obligation may so act as to mislead the other party into acting on the belief that the condition is not insisted on, or that some other act will be accepted as a sufficient substitute for the performance of the condition. In such a case the party entitled to the benefit of the condition may be estopped from relying on it and deemed accordingly to have waived it (d).

Until the condition has been determined, whether by fulfilment, failure or waiver, it is said to be still pending. While the condition is thus pending, the obligation to which it is attached is merely conditional, and performance of it cannot be required or enforced.

(a) See pp. 55-6, *post*.

(b) S. 13, Sale of Goods Act, 1893

(c) S. 11, Sale of Goods Act, 1893; *Alexander v. Gardner* (1835), 1 Bing. N. C. 671; 131 E. R. 1276; *Bentsen v. Taylor*, [1893] 2 Q. B. 274; *Panoutsos v. Raymond Hadley Corp.*, [1917] 2 K. B. 473.

(d) *Hartley v. Hymans*, [1920] 3 K. B. 475; *Yorkshire Insurance Co v. Craine*, [1922] 2 A. C. 541.

To an action for the enforcement of it, it would be a good plea that a condition of the obligation was still pending and unfulfilled. So soon, however, as the condition, if precedent, has been determined by fulfilment or performance, or if subsequent, by failure or breach, or whether precedent or subsequent, by waiver, the obligation to which it is attached ceases to be conditional and becomes, so far at least as the particular condition is concerned, absolute. On the other hand, so soon as the condition, if precedent, has been determined by failure or breach, or if subsequent, by fulfilment or performance, the obligation is destroyed altogether, and it is no longer possible for it to ripen into an absolute obligation.

It is to be observed that the words fulfilment, performance, failure and breach used to describe the determination of conditions are ambiguous until it appears whether the condition is precedent or subsequent. If the condition is expressed as a condition precedent then the fulfilment or performance of it renders the obligation absolute, while its failure or breach destroys the obligation. If, however, the condition is expressed as a condition subsequent or resolute then failure or breach, not fulfilment, of the condition renders the obligation absolute, and fulfilment, not failure or breach, of the condition brings about the destruction of the obligation. There is, indeed, no difference in substance, but merely in words. A condition precedent refers to the event on which the existence of the obligation depends, whereas a condition resolute refers instead to the opposite event on which its non-existence depends. The failure of one of these events is necessarily the occurrence of the other. In order to avoid ambiguity and confusion the terminology appropriate to conditions precedent will henceforth be used (unless in any particular place the contrary is expressly stated), and conditions subsequent and resolute disregarded on the ground that they are convertible by a reversal of expression into the much more usual conditions precedent.

§ 25. Conditional Obligation Examined

The conception of a conditional obligation calls for some examination. By conditional obligation is meant an obligation created and defined by a conditional undertaking. While the conception of a conditional undertaking offers no difficulty, that of a conditional obligation is by no means easy. The difficulty may be best illustrated by reference to a condition *de præsenti*. A merchant agrees to charter a ship on condition that it is now at the port of Cardiff. This is a conditional undertaking, and is said,

therefore, to create a conditional obligation. But the ship is in truth and in fact already either at Cardiff or not. If actually there the condition is already fulfilled, and the obligation is already absolute as soon as made. If not at Cardiff, the condition is already broken at the date of the contract. Since, therefore, the obligation in truth is either absolute or non-existent as soon as the contract is made, what is meant by saying that such a contract creates a conditional obligation?

Before attempting an answer to this question it is well to point out that the same difficulty exists equally, though not so obviously, in the case of a condition *de futuro*. Let us suppose that the same contract was conditional on the ship being at the port of Cardiff within three weeks. If we regard the actual truth of the matter, and disregard the limits of human knowledge and prevision, the case is identical with the former. In the predestined course of nature this ship is either going to be in Cardiff within three weeks or she is not. Contingencies, uncertainties, and chances exist not in the nature of things but in the human mind. A future event, like a present fact, is only uncertain for us and not in itself. If, therefore, this ship is destined to be in Cardiff in due time, the obligation of the charter is already absolute, and in the other alternative it is already non-existent (e).

What, then, does the expression conditional obligation really mean? The true answer would seem to be that a conditional obligation is not in truth a real obligation at all; it is merely the chance or possibility or potentiality of an obligation. The only real obligations are those which are absolute. But the chance or possibility or potentiality of an obligation is itself called an obligation by way of anticipation or prolepsis, and is distinguished from a genuine or absolute obligation by the qualifying epithet "conditional". A conditional obligation, in other words, is a quasi-obligation consisting in the chance or possibility that a real obligation may already exist or may come into existence in the future. The fulfilment of the condition is the transformation of this potentiality into actuality. Conversely, the failure of the condition is the failure of this chance to become a fact. Chance does not exist in *rerum natura*, but it is an important element in human affairs, and the law takes notice of it and makes provision with respect to it.

(e) Cf. Holmes, *Common Law* (1882 ed.), 304—305.

§ 26. One Condition Attaching to Several Obligations

One and the same condition, instead of being attached to a single obligation only, may be and often is attached to a number of distinct obligations, performance of which is due at different times. In such a case the condition may at any point of time be in a different position with respect to the several obligations to which it is so attached. When one of those obligations becomes due, the condition may have been fulfilled; when another becomes due, the condition may have failed; and as to a third, it may be still pending. The result is that one and the same condition may produce different results upon the several obligations of the contract. For this purpose a continuing obligation—that is to say, one which involves continuous performance or repeated acts of performance over a period of time—must be regarded as in reality a number of obligations accruing from time to time (*f*). For example, in a contract of personal service for a fixed period the obligation of the servant to do his work is conditional on his being in sufficient health for that purpose. On any day on which he is well this condition is fulfilled and his obligation is absolute; on any day on which he is sick this condition has failed, and his obligation is non-existent; and as to all days which have not yet arrived, the condition is pending and his obligation remains conditional (*g*).

§ 27. Concurrent Conditions

In certain cases two conditions attaching to two separate obligations are said to be concurrent. It is said, for example, in the Sale of Goods Act, 1893, s. 28, that delivery of the goods and payment of the price are concurrent conditions. They are certainly concurrent obligations in the sense that they are to be performed at the same time, but in what sense are they concurrent conditions? We cannot say both that the seller's obligation to deliver the goods is conditional on the buyer paying the price, and also that the buyer's obligation to pay the price is conditional on the seller's delivering the goods, for this is to reason in a circle and arrive nowhere. Neither party could in such a case make the obligation of the other absolute, except by himself doing something which he was not bound by the contract to do. If the seller wished to enforce the contract, he would first have to deliver the goods and trust the buyer to pay for them; and, similarly, if the buyer wished

(*f*) *E.g.*, *Minnevitich v. Café de Paris*, [1936] 1 A. E. R. 884.

(*g*) *Cuckson v. Stones* (1859), 1 E. & E. 248; 120 E. R. 902; *Marrison v. Bell*, [1939] 2 K. B. 187; see p. 516, *post*.

to enforce the contract, he would first have to pay for the goods and then trust the seller to deliver them. This, of course, is not the law, and it is clear, therefore, that the statement is not to be taken literally, and that payment and delivery are not concurrent conditions in the sense that each is a condition of the other. What this inaccurate statement really means is explained in the Sale of Goods Act itself. For the same section proceeds as follows: "That is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods". In other words, concurrent conditions exist when there are reciprocal obligations which are to be performed at the same time, and which are of such a nature that the readiness and willingness of either party to perform his own obligation is a condition of the obligation of the other party.

§ 28. Effect of Failure of, or Non-Compliance with a Term of a Contract

The effect of failure of or non-compliance with a term in a contract depends primarily on whether the term is purely an undertaking, both an undertaking and a condition, or purely a condition.

If the term is purely an undertaking (not creating a debt) the party injured by the breach will be entitled to recover damages to recoup him for the loss he has suffered from the breach (*h*), and even if he can prove no loss he will be entitled to nominal damages (*i*). In some cases he will be entitled to specific relief, by way of specific performance or injunction, as an alternative or in addition to damages (*j*). Where the undertaking creates a debt the injured party will be entitled to judgment for its amount with or without damages either nominal or substantial (*k*).

If the term is both an undertaking and a condition then in virtue of its operation as a condition the obligation to which it is attached, or the entire contract, if it is attached to the entire contract, will become voidable. The injured party may elect to avoid, or he may waive his right so to do and elect to affirm the obligation or contract. If he waives his right to avoid, *i.e.*, waives the condition, he will be entitled to damages or specific relief to exactly the same extent as if

(*h*) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488, *per* Lord Atkinson, p. 494.

(*i*) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 109 E. R. 842; p. 578, *post*

(*j*) See Fry, *Specific Performance* (6th ed.), pp. 604 ff., ss. 1306 ff.; see pp. 600, 609, *post*.

(*k*) See pp. 589 *et seq.*, *post*.

the broken term had been purely an undertaking and not also a condition. If, however, the injured party does not waive the condition but elects to terminate the obligation or contract he will still be entitled to damages; but where it is the contract which is terminated these will be assessed for the loss of the contract as a whole and not merely for the loss following from the particular breach (l).

If the term is a pure condition then its failure will not give rise to an action for damages but will operate either immediately and automatically to put an end to the obligation or contract to which it is attached, or else to confer on a party to the contract the right at his option to put an end to the obligation or contract. In the former case the obligation or contract becomes *ipso jure* void on the failure of the condition; but in the latter case it becomes merely voidable, and does not become actually void until and unless the party chooses to exercise his right of rescission. For example, a contract which is subject to the express or implied condition that it shall remain possible of performance becomes *ipso jure* void and determined on the failure of that condition by reason of supervening impossibility (m). An example of a pure condition which merely renders the obligation or contract voidable is afforded by the clause commonly inserted in policies of fire insurance whereby the assured is required, as a condition of recovering under the policy, upon the occurrence of any loss or damage forthwith to give notice to the insurer and within a specified time to deliver detailed particulars (n).

§ 29. Implied Conditions

As has already been stated (o), the terms of a contract may be express or implied. The question as to the existence of implied terms is of chief importance and difficulty in respect of implied conditions rather than in respect of implied undertakings. The parties to a contract are commonly sufficiently careful to express their contractual obligations, but they frequently show too little prevision and circumspection to express adequately all the conditions that are to attach to those obligations in the event of unforeseen contingencies or unknown circumstances.

There are three classes of case in which the question of implied conditions is of special importance. These will be dealt with more

(l) See pp 560 *et seq*, *post*

(m) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 122 E. R. 309; see p. 508, *post*.

(n) *Yorkshire Insurance Co. v. Craine*, [1922] 2 A. C. 541. On the matter generally see *Jackson v. Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, 143.

(o) See p. 33, *ante*.

appropriately at later stages of this inquiry, but it is advisable to illustrate the matter by stating their nature.

In the first class of case the question is whether a breach of contract by one party amounts to a breach of an implied condition attached to the obligations of the other party so that that other may forthwith determine those obligations by rescinding the contract.

In the second class of case the question for determination is how far a subsequent unanticipated change of circumstances defeating the purpose of the contract or rendering its performance impossible constitutes a failure of an implied condition of the contract so as to release the parties from their obligations under it. How far, in other words, are contracts to be read by the law as subject to the implied condition *rebus sic stantibus*?

In the third and last class of case the question for determination is how far the truth of facts stated or assumed by the parties as existing at the date of the contract is to be taken as the contractual basis of the contract so that the actual existence of the facts so stated or assumed amounts to an implied condition the failure of which invalidates the contract: how far, that is to say, a contract which states or assumes that the facts are so is subject to an implied condition that they actually are so.

§ 30. The Internal and External Elements of a Contract

The terms of a contract, whether express or implied, and whether consisting of promises, warranties, or conditions, must be distinguished from those other elements of a contract which for want of any better or recognised name may be called its external elements. The terms of a contract are its internal elements—its contents—as established by the intention of the parties, whether actual and express or constructive and implied by law. The terms of a contract are its conventional elements constituted by the exercise, actual or constructive, of that autonomous authority whereby persons are permitted by the law to formulate their own rights and obligations *inter se*. Distinct and apart from these internal or conventional elements of a contract are the external or legal elements contributed by the law itself independently of any intention expressed by the parties or constructively attributed to them by the law. Just as the validity of a contract is subject to conditions imposed upon it by way of internal or conventional terms, so also it is subject to legal or external conditions imposed on it by the law itself without reference to the intention of the parties. And just as

a contract creates internal and conventional obligations due to the express or constructive intention of the parties, so also it may create external and legal obligations which are attached by the law itself to the contract as the legal consequences of it, and not because of any actual or constructive intention of the parties to subject themselves to such obligations.

Thus the rule that a contract for the sale of goods is voidable for fraud and the rule that such a contract is in certain cases voidable for want of merchantable quality in the goods sold are both rules of law. Nevertheless, they are rules essentially different in their nature. The rule as to fraud is a legal or external condition of the contract, while the rule as to merchantable quality is a conventional or internal condition of it. The first rule stands outside the contract as controlling it *ab extra*; the second stands within the contract as constituting one of its terms, although it is a term implied in law, and not agreed upon by the parties in fact. The rule as to fraud is not established by means of any attribution by the law of any such intention to the parties; whereas the rule as to merchantable quality is based on such an attribution, and therefore it is, by way of construction, a term of the contract. Similarly, in a contract between master and servant the law establishes, *inter alia*, two obligations which are not to be found declared by the express terms thereof. The first is the obligation of the master to use all due care for the personal safety of his servant in respect of the buildings, machinery, plant, and appliances used by him in his employment (*p*). The second is the obligation of the master to pay compensation to his servant for an accidental injury suffered by him in his employment (*q*). There is an essential legal distinction between these two obligations in respect of their source. The law establishes the first of them by reading an implied term into the contract whereby an undertaking to accept this obligation of care is constructively attributed to the master. He is deemed by the law to have agreed to this, and the obligation is treated as contractual in its source and nature accordingly. But the second obligation—that of paying compensation for accidents—has been established by the law independently and by its own *ipse dixit* without recourse to any constructive implication of a conventional term in the contract. This obligation, therefore, stands outside the contract as an external element and consequence of it—

(*p*) See *Wilsons and Clyde Coal Co. v. English*, [1938] A. C. 57.

(*q*) Workmen's Compensation Act, 1925.

as a non-contractual obligation attached to the contract by the law *proprio vigore* without the aid of any interpretative extension of the agreed terms (r).

In attempting to define a contract we have already adverted to those accessory obligations thus included among the external and legal elements of a contract instead of among the internal and conventional terms of it. We there classed those obligations as pertaining to the sphere of status and not as contractual in their nature (s). To employ a servant is not merely to make a contract with him and thereby to incur those conventional obligations which constitute the express or implied terms of that contract; it is also the voluntary acceptance of a legal status—namely, that of an employer of labour—to which the law itself attaches obligations on its own account.

The legal conditions imposed upon a contract by the law itself *ab extra* are strictly analogous to the conventional conditions imposed by the parties themselves and forming part of the internal contents of the contract. To a large extent legal and conventional conditions operate in the same manner, are directed to the like purposes, and are governed by similar rules. It is for the law as it thinks fit, guided partly by historical considerations and partly by those of convenience and *elegantia juris*, to decide whether any condition or obligation attached to a contract shall be treated as a legal and external element of that contract attributable to the *ipse dixit* of the law, or as an implied term thereof attributable to the constructive intention and agreement of the parties. The law may say, as it pleases, either that the obligation of an innkeeper or of a common carrier for the loss of goods entrusted to him is an obligation attached by the law itself to the status and calling of an innkeeper or common carrier; or that it is the outcome of an implied undertaking contained in the contract which an innkeeper or a carrier makes with his guest or customer. When a rule of law is peremptory—that is to say, not capable of being excluded or derogated from by the express agreement of the parties—the obligation resulting therefrom is normally and naturally regarded as an external consequence of the contract rather than as created by an implied term thereof: as in the case of workmen's compensation. Where, on the other hand, a rule of law is merely provisional—that is to say, subject to the maxim *modus et conventio vincunt legem*—the resulting obligation is normally and naturally regarded as pro-

(r) See p. 282, n. (l), *post*.

(s) See p. 7, *ante*.

ceeding from an implied term forming part of the internal contents of the contract. So also with the legal and the conventional conditions of the contract. It is a legal and external condition that performance of the contract shall be and remain lawful; but it is a conventional and internal condition that performance shall be and remain possible. This line of division, however, is not invariably or necessarily observed. The law is not constrained by any rule of logic to treat an obligation or condition as based on an implied term in the contract merely because it is capable of exclusion by an express term. The law may, if it thinks fit, regard the liability of a common carrier for the safety of the goods as a legal incident and consequence of the status of a common carrier, and not as a product of an implied undertaking contained in the contract, even while the law recognises at the same time the right of the parties to exclude or modify this legal incident by an express term to that effect.

PART II

THE MAKING AND EVIDENCING OF A CONTRACT

Having discussed the nature of a contract in respect both of its jurisprudential character and its internal elements or terms, we next proceed to consider how a contract is made. We have seen that contracts may be either by deed, or by agreement, marked by consideration. We shall first discuss the making of contracts by deed; and then the making of contracts by agreement, marked by *consideration: how agreement is produced; and when it can be said to be marked by consideration*. Next we shall consider the consequences of a contract (whether specialty or simple contract) being made or evidenced by writing. Finally we must consider the degree of certainty with which the declaration which is the contract must exhibit the contractual will or wills of the declarant or declarants.

CHAPTER IV

MAKING OF A CONTRACT BY DEED

§ 31. Execution of a Deed

A deed, whether constituting a contract or some other act in the law (a) must at common law be a writing on paper, vellum or parchment (b), sealed and delivered by the party making it; and by modern statute (c), except in the case of a corporation aggregate, signed by that party also (d).

(a) *R. v. Morton* (1873), L. R. 2 C. C. R. 22, per Bovill, C.J., 27.

(b) Norton, *Deeds* (2nd ed.), 3—4.

(c) S. 73, Law of Property Act, 1925, providing that "Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone shall not be deemed sufficient". Whether signature was generally required before the enactment of this provision is not altogether free from doubt; but the preponderance of authority is that it was not. Williams, *Real Property* (24th ed.), 217, 224; Norton, *Deeds* (2nd ed.), 7; Stroud, *Judicial Dictionary* (2nd ed.), 1880. In practice, of course, deeds were invariably signed even before the Law of Property Act, 1925.

(d) As to when a deed binds one who has not executed it, see p. 383, *post*.

In the case of a corporation aggregate (e) the common law rule appears to be that sealing and delivery (f) shall take place at a duly constituted meeting of the corporation in pursuance of a resolution of a majority of the members then present (g). Alternatively, sealing and delivery may be effected by an attorney appointed by a deed executed as above stated (h). The constitution of the corporation may, however, provide different or additional formalities to accompany sealing and delivery (i). A typical provision is exemplified by article 71 of Table A of the Companies Act, 1929: "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose; and that director and the secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence". Moreover, in the case of a corporation aggregate created for trading purposes where no particular formalities for the execution of deeds are prescribed by its constitution, the common law requirements have been relaxed so that the seal may be affixed and delivery effected by those persons to whom has been entrusted the management of the corporation's affairs (k) (l).

§ 32. Sealing

Sealing is a device which was adopted for the authentication of instruments in the days when handwriting was a rare accomplishment. In its proper form and in legal theory it consists in the act of impressing either into the substance of the document itself or into wax attached to the document an engraved signet kept and used by

(e) Execution of documents by a corporation sole is ordinarily governed by the same rules as apply in the case of a natural person acting in his individual capacity. At common law a corporation sole need not have a common seal. 1 Bl. Com. 476

(f) As to whether delivery of the deed of a corporation aggregate is necessary at common law, see Halsbury, *Laws of England* (2nd ed.), vol. 10, 204; Norton, *Deeds* (2nd ed.), 11.

(g) *Staple of England* (Mayor, etc., of Merchants of the) v. *Governor and Company of Bank of England* (1887), 21 Q. B. D. 160, 165—166.

(h) *Ibid.*

(i) E.g., *D'Arcy v. The Tamar, etc., Ry.* (1867), L. R. 2 Ex. 158.

(k) *Re Barnard's Banking Co.* (1867), L. R. 3 Ch. 105, 116

(l) The rigour of such formal requirements, whether arising at common law or from the constitution of the corporation, is tempered by the principle that where an instrument purporting to be executed by a corporation is *ex facie* regular the corporation cannot set up by way of defence to an action on the instrument any irregularity or non-observance of formalities which, unknown to the other party, may have occurred behind the corporation's doors. *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 119 E. R. 887; *Duck v. The Tower Galvanizing Co., Ltd.*, [1901] 2 K. B. 314. See also s. 74, Law of Property Act, 1925.

any person for the purpose of identifying and authenticating documents to which he has become a party. In practice, however, as recognised by modern law, the sealing of an instrument may be merely constructive or fictitious. Any instrument is duly sealed in the eye of the law if it bears on its face either a seal in the true sense or any sign or symbol which purports to be a seal and which has been recognised and adopted by the party as his seal in the act of executing the instrument. For example, an instrument may become a duly executed deed if it has attached thereto an adhesive wafer, and if the party on signing the deed acknowledges the wafer as his seal. It is usual for him to go through the pretence of actual sealing by placing his finger on the wafer and saying: "I deliver this as my act and deed". So an incorporated company may seal an instrument with a rubber stamp with the device of a circle containing the name of the company (m).

That a seal has been affixed to a document, however, does not necessarily mean that that document is a deed. In *R. v. Morton* (n) Bovill, C.J., said: "Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I never heard it suggested that that is a deed" (o). The examples given by the learned Chief Justice are, indeed, all of documents which by reason of their subject-matter could not under any circumstances be regarded as deeds. The nature of the subject-matters with which a deed might deal was described by him in an earlier passage in his judgment: "In some of the definitions given a deed is described as being something in the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed". But even where the subject-matter dealt with in the document is such

(m) See Stroud, *Judicial Dictionary* (2nd ed.), *sub nom* "Seal".

(n) (1873), L. R. 2 C. C. R. 22, 27.

(o) See also *Chanter v. Johnson* (1845), 14 M. & W. 409; 153 E. R. 534.

that the document could be a deed, the affixing of a seal will not necessarily convert it into a deed. In addition to being sealed it must have been intended to be a deed. This is expressed in the technical language of the law by saying that after being written and sealed it must be delivered, *i.e.*, as Bovill, C.J., said, "delivered as a deed", as the act and deed of its maker or makers.

§ 33. Delivery

The word delivery points to a time when the only evidence which the Courts would accept of the intention of the maker of a sealed document to be bound by it as his act and deed was the actual delivery of the document to or to the agent of the party to whom the maker was to be bound. It is now, however, and long has been, the law that any conduct or words at all, provided they are of sufficient probative force, will be accepted to show that the maker of the document intended to be bound by it as his deed. Delivery to the other party is not now necessary (*p*), nor, indeed, even communication to him of the making of the deed. "As was said by Blackburn, J., in *Xenos v. Wickham* (*q*) no particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery: 'but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it' " (*r*).

If a sealed document should declare on its face that it has been signed, sealed and delivered, and be shown to have been sealed and signed, this will ordinarily be taken as conclusive evidence of delivery (*s*). Even where there is no such declaration of delivery, delivery will, in the absence of proof to the contrary, be presumed

(*p*) *Doe v. Knight* (1826), 5 B. & C. 671; 108 E. R. 250.

(*q*) (1867), L. R. 2 H. L. 296, 312.

(*r*) *Macedo v. Stroud*, [1922] 2 A. C. 330, 337; see also *Goodright v. Straphan* (1774), 1 Cowp. 201; 98 E. R. 1043.

(*s*) *Xenos v. Wickham* (1867), L. R. 2 H. L. 296, *per* Lord Chelmsford, L.C., 320.

from sealing (*t*). Moreover, where the document has been made and sealed by an individual, proof that it was not delivered, *i.e.*, was not intended to operate as a deed, will not easily be effected. If the party did not intend the document to be a deed, why should he have sealed it, when for purposes of authentication all he need have done was to sign it? But where the document is the document of a corporation aggregate the position is otherwise. At common law sealing by a corporation aggregate not only serves the same purposes as sealing by an individual but is also the equivalent of signing by an individual (*u*). It is the way in which, at common law, such a corporation authenticates documents whether deeds or not. Hence, that a document bears the corporate seal is not of the same cogency to show that that document is a deed as is its bearing the seal of an individual, and that it was not delivered as a deed may be much more easily established (*x*).

§ 34. Alterations in a Deed before and after Delivery

A deed has no operation as such until delivery (*y*). It follows, therefore, that a deed may be altered before delivery (*z*). After delivery, however, the only alterations which may be made are alterations with the consent of all parties for the purpose of carrying out the intention of the parties at the time of delivery (*a*). But where what is delivered is substantially a document in blank, the party signing, sealing and delivering it having at the time of delivery no specific intention as to what is to be effected by it, but merely intending that some other person shall subsequently complete it as he may see fit, this, even when so completed, will not, without re-delivery, be a deed (*b*).

(*t*) *Hall v. Bainbridge* (1848), 12 Q. B. 699; 116 E. R. 1032; Halsbury, *Laws of England* (2nd ed.), vol. 10, 198; see also *Talbot v. Hodson* (1816), 7 Taunt. 251, 129 E. R. 101. In *Clement v. Gunhouse* (1802), 5 Esp. 83; 170 E. R. 745, Chambre, J., held that ship's articles, having as a testimonium "To which the parties have set their hands", although sealed as well as signed, were not a deed.

(*u*) *Dartford Union Guardians v. Trickett* (1888), 59 L. T. 754.

(*x*) In *Wellington City Corporation v. Commissioner of Taxes*, [1931] *Gazette L. R.* 333, a contract under the seal of a municipal corporation was held by the Supreme Court of New Zealand not to be a deed within the meaning of a statute imposing a stamp duty on deeds, but not defining a deed.

(*y*) Bayley, J., *Styles v. Wardle* (1825), 4 B. & C. 908, 911; 107 E. R. 1297, 1298.

(*z*) Brooke's Abr. tit. *Faits*, 327, pl. 61 (*b*).

(*a*) Norton, *Deeds* (2nd ed.), 39.

(*b*) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610.

§ 35. Delivery in Escrow

Although for a sealed writing to be a deed it must appear that its maker intended it so to be, it is not necessary that he should have intended it forthwith and unconditionally to bind him. His intention may have been that he was to be bound only if some condition should be fulfilled; and if he should have sufficiently expressed such an intention it will be effective. The expression of such an intention is known technically as delivery in escrow; and a sealed document so delivered is itself called an escrow (*i.e.*, scroll). “It is no doubt true that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only” (*c*). The matter is clearly explained by Farwell, L.J. (*d*): “. . . it is essential to the validity of the deed that it shall have been delivered. There are two sorts of delivery, and two only, known to the law, one absolute, and the other conditional, that is as an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated as a complete delivery, *cadit quaestio*; if it did not, then it must be either an escrow or a nullity. The mode in which it in fact operated is a question of intention, primarily of the grantor, and secondarily of the grantee; nothing passes out of the grantor against his intention, and no one can be compelled to accept an assignment of any property, onerous or otherwise, without his consent. Now an escrow or script is not a deed at all; it is a document delivered upon a condition on the performance of which it will become a deed, and will take effect as from delivery, but until such performance it conveys no estate at all” (*e*).

Express and formal words are not necessary to constitute delivery in escrow. The contrary is, indeed, stated in Sheppard’s *Touchstone* (*f*), but that statement is not now the law. In the words of Vaughan Williams, L.J. (*g*), “in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, but you are to look at all the facts of the case attending the execution, to all that took place at the time, and to the result of the transaction; and therefore, though in form there is an absolute delivery, if it can be reasonably inferred that the instrument was delivered not to take effect as a deed till a certain

(*c*) Lord Haldane in *Macedo v. Stroud*, [1922] 2 A. C. 330, 337.

(*d*) *Foundling Hospital v. Crane*, [1911] 2 K. B. 367, 377.

(*e*) See also *per* Blackburn, J., advising the House of Lords in *Xenos v. Wickham* (1867), L. R. 2 H. L. 296, 312.

(*f*) P. 58.

(*g*) *Foundling Hospital v. Crane*, [1911] 2 K. B. 367, 374.

condition was performed, it will nevertheless operate as an escrow: see the judgment of Parke, B., in *Bowker v. Burdekin* (h). "It obviated all question as to the intention of the party", said Abbott, C.J., in *Murray v. Earl of Stair* (i), "if at the time of the delivery he expressly declared that he delivered it as an escrow; but that was not essential to make it an escrow".

It is further said in Sheppard's *Touchstone* (k) that in order that a sealed writing should be an escrow it should not be delivered "to the party himself to whom it is made". Like the statement considered in the last preceding paragraph, however, this also is no longer the law (l). Nevertheless, the circumstance that a sealed writing is found in the possession of the person who would be entitled to claim under it if it had been delivered as a deed is strong evidence that it has been delivered as a deed (m). Likewise that a deed, delivered to a third person as an escrow, is subsequently found in the possession of the grantee is evidence that the condition upon which it was delivered has been fulfilled (n).

A sealed writing, delivered as an escrow, becomes operative as a deed immediately upon the performance of the condition subject to which it was delivered (o). As is said in Sheppard's *Touchstone* (p), "But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were [had been] delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then . . ." If the maker of the document should have endeavoured to reserve to himself a power of revocation, this would negative delivery as an escrow (q) (r). In such a case the utmost operation the document

(h) (1843), 11 M. & W. 128, 147; 152 E. R. 744; and *Naas v. Westminster Bank*, [1940] A. C. 366, 399.

(i) (1823), 2 B. & C. 82, 88; 107 E. R. 313.

(k) *Loc. cit.*

(l) *Naas v. Westminster Bank*, [1940] A. C. 366, 399; *London Freehold and Leasehold Property Co. v. Suffolk*, [1897] 2 Ch. 608, 621—622; Norton, Deeds (2nd ed.) 18.

(m) *Rowley v. Rowley* (1854), Kay 242, 251; 69 E. R. 103, 107. See also Preston's edition (1820) of the *Touchstone* at p. 59, where there appears, after the author's statement that delivery to a party who would be entitled if the document were a deed is as a matter of law delivery as a deed, an editorial addition, "At this day, the jury would be directed to draw their conclusion from all the circumstances". Cf. Blackburn, J., *Xenos v. Wickham* (1867), L. R. 2 H. L. 296, 312—313.

(n) *Harc v. Horton* (1833), 5 B. & Ad. 715; 110 E. R. 954.

(o) *Xenos v. Wickham* (1867), L. R. 2 H. L. 296, per Lord Cranworth, 323, 324.

(p) P. 59.

(q) *Foundling Hospital v. Crane*, [1911] 2 K. B. 367, 374—376, 379, 381.

(r) This does not mean that a power of revocation may not be reserved in a deed. See p. 19, n. (h), ante.

could ever have (unless it were subsequently validly delivered) would be that of a simple writing.

Just as a document delivered as an escrow cannot be revoked by the voluntary act of its maker, so it will not be invalidated by his ceasing, whether voluntarily or involuntarily, after delivering the document as an escrow, to have the capacity to execute a deed in that sense (s). To this extent the operation of a document delivered as an escrow relates back, upon the fulfilment of the condition, to the time of its delivery. It follows from this that the maker must have possessed sufficient capacity to make such a deed at the time of the delivery in escrow (t).

A document cannot be delivered as an escrow to take effect upon the death of the maker (u). “It is an attempt by means of the deed to make in regard to the property or interest dealt with by the deed a testamentary disposition which is not attested in the way provided by the Wills Act, and which our law treats as a nullity” (x).

(s) *Perryman's Case*, 5 Co Rep. 84a; 77 E. R. 181; *Graham v. Graham* (1791), 1 Ves. 272; 30 E. R. 339.

(t) *Sheppard's Touchstone*, 59.

(u) *Foundling Hospital v. Crane*, [1911] 2 K. B. 367.

(x) *Ibid.*, per Kennedy, L.J., 382.

CHAPTER V

MAKING OF A SIMPLE CONTRACT : (1) AGREEMENT

§ 36. Every Agreement is an Accepted Offer

We have seen (a) that an agreement is the union into a single whole, and undivided declaration of will of declarations, each in the same sense, by several persons of their wills in respect of a particular matter. This implies something more than that several persons should individually declare their wills each in the same sense. Thus one would not say that all those voting for the same candidate at an election thereby entered into an agreement. There is no union of their several declarations of will into a single declaration of will. What more, then, is necessary? Clearly there can be no such single declaration of will unless each party knows what the others have declared to be their several wills. Each must therefore communicate his intention in the matter to the others (b). But is this enough? It seems not. If, for example, two voters at an election were to tell each other for which candidate they respectively intended to vote and it appeared that each intended to vote for the same candidate they would still not have entered into an agreement. Their declarations of will would still not have been united into one undivided declaration of will. It would seem that not only must there be communication between the parties of the contents of the several wills, but further that communication must appear to have been made for the purpose of producing agreement. That is to say, it must appear to have been made not merely in order that the several parties might be informed of each other's wills but for the purpose of procuring the several parties to assent to a common declaration of will. The declaration of will of one party must take the form of a proposal to the others, and the concurring declaration of will of the others must be in terms assents to that proposal (c)

(a) See p. 13, ante.

(b) See *Household Insurance Co. v. Grant* (1879), 4 Ex. D. 216, per Thesiger, L.J., 221; and *Haynes v. Haynes* (1861), 1 Dr. & Sm. 426; 62 E. R. 44. In the latter case Kindersley, V.-C., said (p. 433; E. R. 445): "when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then an agreement or contract between the parties is constituted".

(c) Cf. *R. v. Clarke* (1927), 40 Commonwealth L. R. 227.

In the law of contract such a proposal is commonly called an offer and the assent to it an acceptance of it (d).

Is it true to say that every agreement is the result of offer and acceptance? It appears that it is. "Every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer. In speculative matters this would take the form, 'Do you think so and so?' 'I do'. For the purpose of creating obligations it may be represented as, 'Will you do so and so?' 'I will'" (e).

Sir Frederick Pollock suggested, indeed, that where two parties enter into an agreement by signing a document prepared by some indifferent third person, or by verbally assenting to an arrangement proposed by such a person, the analysis into offer and acceptance of the process whereby their agreement was made breaks down (f). In the case of the document prepared by a third person, however, it does not seem a difficult application of the analysis of agreement into offer and acceptance to regard the party who first signs the document as the offeror and the other party as the acceptor. The first signature means: "I offer to agree with you in these terms if you accept my offer by signing this document yourself". The second signature means, "I accept your offer as expressed in this document". The case of the two parties who verbally assent to an arrangement suggested by an indifferent third person seems readily susceptible of analysis into offer and acceptance where first one party assents and then the other. The assent of the first is an offer by him to the other and the assent of the second is an acceptance of that offer. The position is more difficult where the two parties accept simultaneously the terms proposed by the third person. If, however, that were all that the two parties said or did then it would seem that there would be no agreement. Agreement involves the apparent meeting of the minds of the parties, an apparent union of their wills. How can there be an apparent union of wills where

(d) Thus James, L.J., in *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 471, said: "The document, though beginning 'I hereby agree to sell', was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not . . . at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself." So also Lindley, L.J., in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 262: "They [advertisements offering rewards] are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer."

(e) Anson, *Law of Contract* (13th ed., the last edition published in the author's lifetime, edited under his supervision), 18; cf. 18th ed., 12.

(f) *Principles of Contract* (11th ed.), 4-6.

neither party, at the moment when he declares his will, can have heard the declaration of the will of the other party? "How then can there be consent or assent to that of which the party has never heard? . . . The offer could only operate upon the plaintiffs after they heard of it" (g). The same problem, but in slow motion, arises where letters containing corresponding offers cross in the post. These, without more, do not constitute an agreement. "If I write to a person and say, 'If you can give me £6,000 for my house, I will sell it to you', and on the same day, and before that letter reaches him, he writes to me, saying, 'If you will sell me your house for £6,000 I will buy it', that would be two offers crossing each other, and cross offers are not an acceptance of each other, therefore there will be no offer of either party accepted by the other" (h).

A third case in which Sir Frederick Pollock suggested that there was difficulty in analysing agreement into offer and acceptance is where several persons, by entering for some competition on the basis of rules laid down by the managers of the competition, are considered to have agreed with each other to observe those rules (i). But it would seem that when this case is carefully examined it proves to be merely a special instance of the same general type as the case of two parties assenting to terms proposed by a third indifferent person. The first competitor to enter must be taken to be offering, to all other persons who may subsequently enter, an undertaking to observe the rules, if they will for their part give similar undertakings. The second competitor to enter, by so doing, accepts this offer, and himself makes a similar offer to all persons who may subsequently enter; and so on.

We may say, then, that every agreement is an accepted offer.

§ 37. Communication of Offer

It follows from what has already been said that an offer, before it can be accepted to produce agreement, must be communicated to the

(g) *Fitch v. Snedaker* (1868), 38 N. Y. 248.

(h) *Tinn v. Hoffman & Co.* (1873), 29 L. T. 271, per Brett, J., 278. In the same case Blackburn, J., said (p. 279): "When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. . . . The promise or offer being made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other."

(i) *E.g., Clarke v. Dunraven; The Satanita*, [1897] A. C. 59.

offeree (*k*). Communication may be made by word of mouth, writing or other conduct, or by a combination of any of these means. A common instance of an offer made by conduct is the offer of commodities for sale from an automatic vending machine (*l*). So the tender of goods to a tradesman to have work done on them, nothing being said at the time regarding payment, is ordinarily an offer to pay for the work if the tradesman will do it. And other examples, often of a somewhat small sort, can readily be found (*m*).

Communication has two aspects, the method or fact of communication and the matter communicated. Often one aspect is important to the exclusion of the other. Thus, in many cases the only question will be whether the method of communication employed was effective to bring one party into contact with the other. *E.g.*, did the offeror's letter in fact reach the offeree or was it lost in the post? In other cases, however, there will in addition or alternatively be the question of what was communicated. We have seen that it is not a party's secret, unavowed will which is significant in the law of contract, but his declared will (*n*). Declared implies not what a party may afterwards say he intended to declare but what a reasonable and normal person in the position and with the knowledge of the other party would have understood from the declaration (*o*). Accordingly if one party declares his will by communicating an offer to the other party, then whatever the offeror may have intended to offer,

(*k*) *Williams v. Cawardine* (1833), 4 B. & Ad. 621; 110 E. R. 590, which is sometimes cited as an authority to the contrary, merely shows that the motive of an offeree in accepting the offer is immaterial. The offeree in that case, at the time when she gave the information for which the reward was offered, knew of the offer. See report in 5 C. & P. 574; 172 E. R. 1104. It may be inferred from the Judge's remarks as reported in C. & P. that had the plaintiff not known of the offer she would have failed. In *Carhill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, Hawkins, J., in a note appended to his judgment, wrote of *Williams v. Cawardine* as reported in B. & Ad., "I presume . . . that the offer had been brought to her knowledge before the information was given. Otherwise, it is difficult to understand how it could be said that she was party to a contract . . ." See also *Re Northern Electric Wire Co., ex p. Hall* (1890), 68 L. T. 271. *Gibbons v. Proctor* (1891), 64 L. T. 594, in which a Divisional Court apparently decided that one who gave information for which a reward was offered, but who was at the time when he gave the information ignorant of the offer, could nevertheless claim the reward, seems universally to be regarded as unsound. See Pollock, *Contract* (11th ed.), p. 16; Halsbury, *Laws of England* (2nd ed.), vol. 7, 85 n. (*k*). See also *R. v. Clarke* (1927), 40 Commonwealth L. R. 227.

(*l*) Cf. *per* Viscount Haldane, *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, 845.

(*m*) See, *e.g.*, *Hoadley v. McLaine* (1834), 10 Bing. 482, 487; 131 E. R. 982, 984; *Steven v. Bromley & Son*, [1919] 2 K. B. 722; *Brogden v. Metropolitan Railway* (1877), 2 App. Cas. 666; *per* Lord Dunedin, *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, 846; *Sale of Goods Act*, 1893, s. 3.

(*n*) See pp. 3 *et seq.*, *ante*.

(*o*) Except in cases of latent ambiguity such as *Raffles v. Wichelhaus* (1864), 2 H. & C. 906; 159 E. R. 375. See p. 211, *post*.

however much he may have intended to qualify or restrict his offer, he will generally be taken to have communicated an offer of whatever a reasonable and normal (*p*) person, in the same situation and circumstances, and with the same knowledge, as the offeree, would have supposed was being offered (*q*). Conversely, if the offeree has so acted that a reasonable and normal person in the position and with the knowledge of the offeror would have supposed that the offeree understood the offer in the sense in which the offeror intended it, the offeree will be precluded from setting up that he understood it in a different sense (*r*).

The principle upon which the offeree may be precluded from setting up that he did not properly understand or appreciate the offer was very clearly stated by Blackburn, J., in *Harris v. Great Western Railway* (*s*) as follows: "And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke* (*t*) . . . And accordingly, in *Allan v. Mawson* (*u*), where the plaintiff had taken an instrument which on a cursory view appeared to be a draft on Sir John Perring and others, bankers, London, but with the word 'at' in very small letters enclosed in the hook of the S of Sir, so as to make it at least doubtful whether the instrument did not purport to be a promissory note, Gibbs, C.J., asked the jury whether the word 'at' was so inserted for the purpose of deception, for if so, it was to be struck out, and the instrument was a bill of exchange in fact. A similar decision, mentioned by

(*p*) *Parler v. South Eastern Ry.* (1877), 2 C. P. D. 416, 422—423; *Thompson v. L. M. & S. Ry.*, [1930] 1 K. B. 41.

(*q*) *Parler v. South Eastern Ry.*, *supra*.

(*r*) *Smith v. Hughes* (1871), L. R. 6 Q. B. 597; see *per* Blackburn, J., 607.

(*s*) (1876), 1 Q. B. D. 515, 530.

(*t*) (1818), 2 Ex. at 663; 154 E. R. at 656; 18 L. J. Ex. at 119.

(*u*) (1814), 4 Camp 115; 171 E. R. 37.

Lord Hardwicke, in 2 Atk. 32, had been come to by Lord Macclesfield in a case where a man gave a girl a promissory note for '£20 value received which I promise *never* to pay', and the word 'never' was rejected. Both of those cases seem to me to proceed on the ground that in neither case could the defendant, as a reasonable man, believe that the other party had read the words inserted for the purpose of deceit, or that the other party meant to represent to the defendant that he had done so" (x).

Estoppel. As Blackburn, J., indicated, these rules, whereby in certain circumstances an offeror or an offeree may be precluded from setting up that an offer as communicated did or did not contain certain terms, are merely applications of the doctrine of estoppel by representation (y). "That rule is, 'that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or [sic; read 'so as'] to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time'. . . if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth. . . ." (z)

An estoppel, however, will not help one who knows the true facts, and accordingly to the extent that it can be shown that the offeree actually knew the nature of the offer which the offeror intended to communicate the offeree will be precluded from relying upon what would otherwise be taken as the meaning of the offer (a).

Whether in any particular case the offeror is estopped from alleging that his offer contained terms other than those which the offeree admits were communicated to him, or the offeree is estopped from denying that the offer contained terms which the offeror contends were communicated, are ordinarily questions of fact to be

(x) See also *Roe v. R. A. Naylor, Ltd.*, [1917] 1 K. B. 712, and *Koskas v. Standard Marine Insurance Co., Ltd.* (1927), 137 L. T. 165; 43 T. L. R. 169.

(y) See also pp. 3-4, *ante*, and pp. 208 *et seq.*, *post*.

(z) Parke, B., delivering the judgment of the Court of Exchequer in *Freeman v. Cooke* (1848), 2 Ex. 654, 663; 154 E. R. 652, 656. As to the further requirement of the doctrine of estoppel that the representee should not only have acted on the representation but should have done so in such a manner that he would be detrimentally affected if thereafter the representor were allowed to deny what had been represented, see p. 4, n (b), *ante*.

(a) *Hitchman v. Avery* (1892), 8 T. L. R. 698; *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, *per* Hannen, J., 609-610.

decided by the jury (b). But if, on the evidence, only one conclusion is reasonably possible, so that a verdict to the contrary would be reversed as being against the weight of evidence (c), the question should be decided by the Judge accordingly, and not sent to the jury at all (d) (e).

§ 38. Communication of Offer in Ticket Cases

The foregoing principles may be very well illustrated from a series of decisions in cases in which a contract was evidenced by a ticket such as a railway, boat or cloakroom ticket. In such cases the person delivering the ticket (the railway, ship or cloakroom proprietor) is regarded as the offeror and the other person (the intending passenger or depositor) as the offeree. "A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it" (f). It is common for such offers to contain numerous terms modifying or excluding liabilities under which the offeror would, by common law or statute, ordinarily lie (g). When, however, the offeror seeks to take advantage of such a term, the

(b) *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, 843-4.

(c) See *Mechanical and General Inventions Co. v. Austin*, [1935] A. C. 346; especially *per* Lord Wright, pp. 372 ff.

(d) *Watkins v. Rymill* (1883), 10 Q. B. D. 178, 190; *Burke v. South Eastern Ry.* (1879), 5 C. P. D. 1: see *per* Lindley, J., p. 6; *Thompson v. L. M. & S. Ry.*, [1930] 1 K. B. 41, 51.

(e) It has, indeed, been said that judgment may not be entered on this principle for the party bearing the onus of proof, but that although on the evidence only one verdict, and that in favour of the party bearing the onus of proof, is reasonably possible, the case must nevertheless go to the jury and if their verdict is contrary to the evidence no other relief than a new trial may be granted. *Per* Lord Wright (*obiter*) in *Mechanical and General Inventions Co. v. Austin*, [1935] A. C. 346, 379; *per* Lord Finlay, L.C. (*obiter* in a dissenting judgment), in *Banbury v. Bank of Montreal*, [1918] A. C. 626, 664; *Winnipeg Electric Co. v. Geel*, [1932] A. C. 690, 696 (P. C.). It would seem, however, that these statements cannot be accepted in view of the decisions, several in the Court of Appeal, one in the House of Lords, and one in the Privy Council, in the following cases: *Millar v. Toulmin* (1886), 17 Q. B. D. 603 (C. A., reversed on facts in House of Lords, 12 App. Cas. 746, where Lord Halsbury, L.C., criticised, *obiter*, the statement of the law in the Court of Appeal: as to this see *Allcock v. Hall*, [1891] 1 Q. B. 444, especially *per* Lopes, L.J., 448); *Paquin v. Beauclerk*, [1906] A. C. 148 (H. L.); *Winterbotham v. Sibthorp*, [1918] 1 K. B. 624 (C. A.); *Thompson v. L. M. S. Ry.*, [1930] 1 K. B. 41 (C. A.); *Hall v. Kingston and St. Andrew Corporation*, [1941] A. C. 284 (P. C.).

(f) *Watkins v. Rymill* (1883), 10 Q. B. D. 178, 188; *Thompson v. L. M. & S. Ry.*, [1930] 1 K. B. 41, 47; see also *Harris v. Great Western Ry.* (1876), 1 Q. B. D. 515, 532-3.

(g) Cf. *per* Lord Dunedin in *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, 846.

offeree may contend that whatever the offeror may have intended to be the contents of his offer, the offer which, in accordance with the principles under discussion, is to be taken as having been communicated to the offeree did not include the term in question, so that the offeror cannot now rely upon it.

Knowledge of Terms. The first question in such a case will be whether the offeree in fact knew of the term and its contents. If the offeree did have this knowledge, then the offeror will have sufficiently communicated the term in question to the offeree; and the offeror will not be estopped from relying upon it. "Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them" (h).

The offeree, however, while not knowing of the contents of the term may have known that there were terms annexed to the offer, and may have been content to accept those terms without further inquiry. In such a case he will be estopped from denying that the term was communicated to him, for by his conduct in assenting to the offer which he knew was subject to terms he represented to the offeror that he had read the terms or otherwise knew their contents or was prepared to accept them without reading them, and thus induced the offeror to contract with him. "Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are" (i).

Even where the offeree does not know that there are terms restricting the scope of the offer, however, he will sometimes be estopped from setting up that those terms were not communicated to him. If the offeror has done what is reasonably sufficient to give the offeree notice of those terms then he is justified, as a reasonable man, in regarding the conduct of the offeree in accepting the ticket without protest as a representation that the offeree has made himself acquainted with those terms. "Whether all that was reasonably

(h) *Parker v. South Eastern Ry.* (1877), 2 C. P. D. 416, 425.

(i) *Ibid.*, p. 421; see also p. 425; *Harris v. Great Western Ry.* (1876), 1 Q. B. D. 515, 524, 532.

necessary to give him [the offeree] this notice was done is . . . a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties" (j). That is to say, in the event of a real conflict of evidence, the question is for the jury. Where, however, the only reasonable conclusion on the evidence would be that what was reasonably sufficient to effect communication was, or was not, done, the issue should be withdrawn from the jury, and decided by the Court in favour of offeror or offeree accordingly (k). In determining whether this is to be done much will depend on the nature of the transaction.

Contract on the Basis of Special Terms. If the Court is of opinion that the transaction is such as is commonly entered into on the basis of special terms and not merely of terms implied by law, and the only evidence is that the offeree accepted without protest a ticket stating plainly on its face (l) the term in question or giving on its face (l) a plain reference to the place where it might be found then (whether or not the offeree knew that there was writing on the ticket) as a matter of law the only possible conclusion will be that reasonably sufficient steps to effect communication have been taken, and the issue must be withdrawn from the jury in favour of the offeror (m). That the ticket does not itself contain the term in question but merely gives a reference to the place where it can be found and that it would take some trouble—even some considerable trouble—to find that place is not of itself evidence to go to the jury that reasonable steps were not taken to effect communication (n). But in a case in which the ticket was handed to the purchaser folded up so that no writing could be seen and the term was in small print with writing in red ink stamped across it, the question of whether reasonably sufficient steps to effect communication were taken was, as the House of Lords held, properly left to the jury (o).

Contract on the Basis of Terms Implied by Law. If, on the other hand, the transaction is one which is generally entered into on the basis of terms implied by law and not specially agreed at the time

(j) *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, per Viscount Haldane, 844.

(k) See notes (d), (c), p. 75, *ante*; and see below.

(l) *Sugar v. L. M. S. Ry.*, [1941] 1 A. E. R. 172.

(m) *Watkins v. Rymill* (1883), 10 Q. B. D. 178; *Thompson v. L. M. S. Ry.*, [1930] 1 K. B. 41; *Penton v. Southern Ry.*, [1931] 2 K. B. 103.

(n) *Thompson v. L. M. S. Ry.*, [1930] 1 K. B. 41, 48, 56.

(o) *Richardson, Spence & Co. v. Rowntree*, [1894] A. C. 217. See also *Henderson v. Stevenson* (1875), L. R. 2 H. L. (Sc.) 470, and *Sugar v. L. M. & S. Ry.*, [1941] 1 A. E. R. 172.

between the parties, and if on the evidence the only-reasonable view is that the offeree did not know that there was writing on the ticket beyond that indicating the character or type of the transaction as distinct from special terms (p), the issue of whether the offeror took reasonably sufficient steps to communicate his offer should in favour of the offeree be withdrawn from the jury. In such a case there is nothing in the offeree's conduct which would justify the offeror, as a reasonable man, in supposing that the offeree was asserting that the term had been communicated to him (q). Where, however, it further appears that the offeree knew that there was writing on the ticket beyond that merely indicating the general type of the transaction that is some evidence that reasonably sufficient steps were taken by the offeror to communicate the terms of his offer, and it is for the jury to say whether in view of all the circumstances reasonably sufficient steps were in fact taken (r).

Term must be Usual and Reasonable. It would seem that in all cases where a term is to be considered as having been communicated to the offeree by reason of his having accepted a ticket containing the term or a reference to it, and not because he is in fact shown to have read the term, that term must be of a usual and reasonable sort. The conduct of the offeree in merely accepting a ticket having upon it terms or a reference to terms of whose contents he is not aware does not amount to a representation to the offeror that even if the offeree has not acquainted himself with terms of an unusual sort he is content to be taken as having done so. It is sometimes said that in such cases there is an implied understanding that the offer does not contain any unusual terms except those to which the offeror has called the offeree's attention in a special and distinctive way. "The truth is, people are content to take these things on trust. They know that there is a form which is always used—they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. . . . I think there is an implied understanding that there is no condition unreasonable to

(p) The authorities all seem to speak of knowing simply that there is writing on the ticket. But a ticket must almost always contain some writing. It may be merely a number to facilitate the identification of the person to whom it is issued; it may be an acknowledgment of the receipt of a sum of money; or it may be a statement of the points between which a passenger will be carried. Presumably what is meant, therefore, is that the party taking the ticket should not have known that there was on the ticket any writing other than this.

(q) *Parker v. South Eastern Ry.* (1877), 2 C. P. D. 416, *per* Mellish, L.J., 423; see also *per* Baggallay, L.J., 425-6; also *Chapelton v. Barry U. D. C.*, [1940] 1 K. B. 532

(r) *Parker v. South Eastern Ry.* (*supra*).

the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand” (s).

Summary. It will be observed that the real question in all the cases we have been discussing is the extent to which in various circumstances the conduct of the offeree, considered in relation to the method adopted by the offeror to communicate his offer, is such as to estop the offeree from setting up that certain terms of the offer were not communicated to him. In all of these cases the offeree’s conduct is equivocal until it is explained by reference to the conduct of the offeror which precedes it. An attempt was made in *L’Estrange v. Graucob* (t) to argue that the principle of these cases could apply when the party who ultimately becomes the offeree tenders to the party who ultimately becomes the offeror a writing which the offeror adopts and signs as his offer, and the offeror subsequently contends that when he signed the writing it contained terms of which he was unaware. But when a party signs a writing his conduct in so doing is unequivocal and does not require or admit of explanation by reference to the preceding conduct of some other party. It amounts to a complete and independent assertion by the signing party that he accepts and adopts the writing in its entirety as his own. “In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud (u), it is wholly immaterial that he has not read the agreement and does not know its contents” (x).

§ 39. Acceptance must Conform to Offer

Inasmuch as the notion of agreement involves that the several declarations of will shall coincide in respect of content it follows that the acceptance of an offer, to produce agreement, must conform accurately to that offer. As it has been said (y), “both parties should agree to the same thing in the same sense”. “It is an undeniable principle of the law of contracts”, said Washington, J.,

(s) *Bramwell, L.J.*, in *Parker v. South Eastern Ry.*, 2 C. P. D. 416, 428; *Thompson v. L. M. & S. Ry.*, [1930] 1 K. B. 41, 49—50, 53, 56. Cf. *Gibaud v. G. E. Ry.*, [1920] 3 K. B. 689 (affirmed [1921] 2 K. B. 426).

(t) [1934] 2 K. B. 394.

(u) And provided the case does not fall within the rule of *non est factum*; as to fraud see Chap. XI, p. 231, *post*, and as to *non est factum*, pp. 212 *et seq.*, *post*.

(x) *Parker v. South Eastern Ry.*, 2 C. P. D. 416, 421; see also *Henderson v. Stevenson* (1875), L. R. 2 H. L. (Sc.) 470, 474, 479; *Hood v. Anchor Line (Henderson Brothers)*, [1918] A. C. 837, 845—846.

(y) *Hannen, J.*, in *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, 609.

delivering the judgment of the Supreme Court of the United States in *Eliason v. Henshaw* (z), "that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it."

To produce agreement, therefore, the acceptance must be absolute and unqualified. If the offeree's answer falls short of this, as by showing that the offeree desired to negotiate as to the offer, not accept it, or because it introduces terms not contained in the offer, or does not extend to terms which do form part of the offer, or otherwise differs from the offer, it will be insufficient to constitute an acceptance (a), although it may amount to a counter offer (b). In many cases, indeed, there will be little room for discussion on this point. If the offer is susceptible of acceptance by a simple statement by the offeree that he accepts it, and the offeree accepts in this way, saying, "I accept your offer", or similar words, then his declaration of will will take its colour from the offer, and must of necessity coincide in content with the offer. But should the offeree, instead of doing this, say, "I accept your offer containing such and such terms", or words to that effect, setting out in detail what he considers to be the offer which he is accepting, then obviously a question may well arise whether the acceptance coincides with the offer.

§ 40. Communication of Acceptance

We have seen that agreement means more than coincidence of declared wills (c). It further involves that the offeror should, to the extent demanded by the doctrine of estoppel, communicate his offer to the offeree (d). Does it also involve that the offeree should communicate his acceptance to the offeror? To produce agreement in its completest sense this would no doubt also be necessary. Complete agreement seems to imply that offeror and offeree should appear mutually to agree with each other, and not merely that the offeree should appear to agree with the offeror. Not only should the mind of the offeree appear to meet the mind of the offeror, but

(z) (1819), 4 Wheaton 225; 4 Curtis 382.

(a) *Holland v. Eyre* (1825), 2 Sim. & St. 194; 57 E. R. 319; *Appleby v. Johnson* (1874), L. R. 9 C. P. 158; *Quenerduaine v. Cole* (1883), 32 W. R. 185.

(b) *Taylor v. Laird* (1856), 25 L. J. Ex. 329; *Hyde v. Wrench* (1840), 3 Beav. 334, 49 E. R. 132.

(c) See p. 69, *ante*.

(d) See p. 71, *ante*.

the mind of the offeror should likewise appear to meet the mind of the offeree.

It is not agreement in this complete sense, however, that is necessarily required by the law of contract. There must, indeed, be some overt act indicative of acceptance (e). Mere mental assent will not do. Agreement involves the concurrence of declared, not undeclared, wills. But what overt act will, in any particular case, constitute an acceptance will depend on the express or implied requirements in that behalf contained in the offer (f), and these may fall far short of conduct amounting to a communication brought or appearing to be brought to the actual knowledge of the offeror (g). Whatever these requirements may be, however, the offeree must comply with them. Otherwise that coincidence in respect of content which is necessary in order that the declarations of will of several persons may unite in agreement will be absent. Thus in *Eliason v. Henshaw* (h) one party made an offer to the other, requesting (as the Supreme Court of the United States held) a reply to be sent to Harper's Ferry. The reply (purporting to accept the offer) was sent to Georgetown, and the offeror refused to go on with the business. The offeree accordingly sued for damages for breach of contract. The Court held that the action could not be maintained and in the course of its judgment said: "The place . . . to which the answer was to be sent constituted an essential part of the plaintiffs' offer . . . an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming part of their proposal, imposed no obligation binding upon them, unless they acquiesced in it, which they declined doing".

Communication of Acceptance normally Necessary. Unless there is some express or implied statement to the contrary in the offer, the offeror will be taken to require that the offeree should actually notify his acceptance to the offeror. The offeror may, however, expressly or impliedly indicate in his offer that some overt act not amounting to such an actual notification to himself either must, or at the option of the offeree may, be adopted. "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary

(e) *Brogden v. Metropolitan Ry.* (1877), 2 App. Cas. 666, 688, 691—692.

(f) *S.C.* 691; *Eliason v. Henshaw* (1819), 4 Wheaton 225; 4 Curtis 382.

(g) *E.g., Household Fire Insurance v. Grant* (1879), 4 Ex. D. 216.

(h) *Supra.*

according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for that other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification” (i).

Performance of Overt Act indicated by Offeror. How, then, is an offeree to know whether, in the case of his particular offer, notification to the offeror is or is not necessary, and if not, what is? If the offer is express upon the point, there will be no difficulty. But more commonly nothing express will appear. “In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog shall be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without notification of it, and a person who makes an offer in an advertisement

(i) Bowen, L.J., in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 269; see also *per* Lindley, L.J., p. 262.

of that kind makes an offer which must be read by the light of that common-sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer" (k).

On the other hand an offer of a guarantee will generally be regarded as impliedly requiring some further notification of acceptance than merely making the advance or otherwise entering into the transaction which is to be guaranteed (l). *Kennedy v. Thomassen* (m) affords an example of a similar type of case. There some trustees were negotiating with an annuitant for the surrender of a life annuity for a cash payment. Ultimately the trustees made an offer which the annuitant decided to accept. She accordingly executed a deed of release, and some little time later her intention to accept was notified to the trustees. Before this was done, however, she had died, and Eve, J., held that the offer had not been one capable of being accepted merely by the offeree's acting upon it by executing the release, but that it had impliedly required that the intention to accept should have been communicated to the offerors.

Acceptance by Post. The principle that an offer is accepted by the offeree performing whatever overt act is expressly or impliedly indicated by the offeror as sufficient for that purpose is exemplified by a series of cases on acceptance by letter. Where by reason of general usage or of the relations between the parties in any particular transaction or of the terms in which the offer was made (n) it would be reasonable to expect that an acceptance would be posted, the offeror will be taken (in the absence of an express statement to the contrary) (o) to have indicated that the posting of a letter assenting to the offer will of itself be a sufficient acceptance, and this irrespective of whether the letter should be delayed (p), or even lost (q), in the post.

Thus in *Re Imperial Land Company of Marseilles, Harris' Case* (r), Harris, by a letter sent through a bank to the directors of the company, applied for an allotment of shares. The letter gave

(k) *Bowen, L. J., in Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 270.

(l) *McIver v. Richardson* (1813), 1 M. & S. 557; 105 E. R. 208; *Mozley v. Tinkler* (1835), 1 Cr. M. & R. 692, 149 E. R. 1258.

(m) [1929] 1 Ch. 426.

(n) *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 217, *per* Baggallay, L. J., 228; *Henthorn v. Fraser*, [1892] 2 Ch. 27, *per* Lord Herschell, 32.

(o) *Household Fire Insurance Co. v. Grant*, *supra*, *per* Thesiger, L. J., 223.

(p) *Dunlop v. Higgins* (1848), 1 H. L. C. 381; 9 E. R. 805.

(q) *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 217, *overruling British and American Telegraph Co. v. Colson* (1871), L. R. 6 Ex. 108.

(r) (1872), L. R. 7 Ch. 587.

Harris's name in full, and his address at Dublin. The company was a London company. The directors decided to accept Harris's offer and allot him shares, and a letter to this effect was posted by the company in London, directed to Harris at his Dublin address as given in his application. After the posting of this letter but before its arrival, Harris had attempted to withdraw his application. Mellish, L.J. (s), thus stated the question for decision: "When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a complete contract made?" The Court answered this question by holding that the attempted revocation was too late as the offer was accepted when the letter of acceptance was placed in the post. "It [the contract] was completed in exactly the way which the appellant desired, that is to say, he gave his address in *Dublin*, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post . . . the contract was completed at the time when the letter of allotment was properly posted by the company" (t).

When, then, can it be said that in accordance with ordinary usage a reply by post might reasonably have been anticipated by the offeror, and must therefore be taken to have been authorised by him? Certainly it will be so if the offeror, residing in a different town from the offeree, sends his offer by a posted letter (u). Indeed, a posted offer would *prima facie* seem to invite a posted acceptance even though offeror and offeree should be near neighbours. In *Household Fire Insurance Co. v. Grant* (x) the offeror handed his offer to the offeree's agent in Glamorganshire. The agent sent the offer by post to the offeree at London. "In this case", said Thesiger, L.J. (y), "the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorised the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." In cases which do not so obviously as these invite an answer by post all the circumstances must be considered in the light of what is the ordinary course of business in such a matter to see whether a postal acceptance is excluded. If there is any doubt it should,

(s) L. R. 7 Ch. at p. 593.

(t) *Per James, L.J.*, 592.

(u) *Dunlop v. Higgins* (1848), 1 H. L. C. 381; 9 E. R. 805.

(x) (1879), 4 Ex. D. 216.

(y) P. 218.

it is submitted, be resolved in favour of allowing a postal acceptance (z).

It is to be observed that where the offer invites a posted acceptance the handing by the offeree of a letter of acceptance to his servant or agent with instructions for its delivery or posting to the offeror will not of itself be a sufficient acceptance (a); nor, on the same principle, will delivery to a postman, who is not an official collector of mail, of a letter of acceptance with instructions for its posting (b).

That it would be permissible to accept by post does not necessarily mean that an acceptance made in some other way will not be equally valid. It may appear from the offer and the surrounding circumstances that only a posted acceptance will be sufficient; or it may appear that an acceptance may be effected either by posting a letter or by some other method at the offeree's option. In *Tinn v. Hoffman* (c) it was said that an offer requesting "reply by return of post" might be accepted by telegram, verbal message, or any other means which should reach the offeror not later than a letter sent by return of post would have arrived.

Revocation of Acceptance. It is unsettled whether in cases where an acceptance by posted letter is either required or permissible the posting of the letter should be regarded as in the first instance a merely deliberative act subject to revocation by telegram or other similarly speedy communication reaching the offeror at a time when he has not yet received the letter. If such a rule were admitted the cases as to letters of acceptance lost in the post would demand that it be qualified in some way. Presumably the offeree, in posting his letter, contemplates that it will reach the offeror in the ordinary course of post, and it would not only be inconsistent with these cases, but unreasonable in fact, to imply in the offeree's letter a power to revoke his acceptance by a notification reaching the offeror at a time later than this. Any such rule should therefore be qualified so that the revocation should reach the offeror either before the letter of acceptance reaches him or before it would have reached him in the ordinary course of post, whichever of these times is the

(z) Cf. *per* Bramwell, L.J. (dissenting judgment), *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216, 233.

(a) *Re National Savings Bank Association, Hebb's Case* (1867), L. R. 4 Eq. 9; *Re Imperial Land Company of Marseilles, Harris' Case* (1872), L. R. 7 Ch. 587, *per* James, L.J., 592.

(b) *Re London and Northern Bank, ex p. Jones*, [1900] 1 Ch. 220.

(c) (1873), 29 L. T. 271.

earlier. As to whether a rule thus qualified should be recognised by the law it may be said, first, that the logic of the decisions on acceptance by post does not appear to be opposed to it, and secondly, that justice and convenience require it. It is difficult to resist the force of Bramwell, L.J.'s remarks in the course of his dissenting judgment in *Household Fire Insurance Co. v. Grant* (d) (the decision in which, of course, was upon a different question): "It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed" (e).

Acceptance by Telegram. If it should appear that a telegraphed acceptance would be consistent with the offer, it would seem, on analogy with the cases on posted acceptances, that the lodging of the telegram for transmission would amount to an acceptance of the offer (f).

Overt act of Acceptance Dispensed With. It might have been thought that if the offeror purported to dispense with any overt act of acceptance at all, then while this attempted dispensation would not be entirely effective, it would be effective to the extent that any overt act on the part of the offeree indicating an intention to accept the offer would suffice. The law, however, is that in such a case the matter is to be considered as though the offeror had made no specific reference at all to the manner of acceptance, so that whatever would have been necessary to constitute an acceptance had there been no such reference will still be necessary to produce that result. Thus in *Felthouse v. Bindley* (g) Paul Felthouse wrote to

(d) (1879), 4 Ex. D. 216, 235.

(e) Cf. Anson, Contracts (18th ed.), 27.

(f) Cf. *Cowan v. O'Connor* (1888), 20 Q. B. D. 640.

(g) (1862), 11 C. B. (N.S.) 869; 142 E. R. 1037; affirmed in Exchequer Chamber, 11 W. R. 429.

John Felthouse a letter containing an offer to buy a horse, saying: "If I hear no more about him, I consider the horse mine at £30 15s." No reply was sent to this letter, but John Felthouse told an auctioneer who was selling his farming stock to take the horse in question out of the sale as it had already been sold. Nevertheless the Court of Common Pleas held that this overt act on John Felthouse's part, although clearly indicating an intention to accept Paul Felthouse's offer, was no sufficient acceptance of that offer.

Inadequate Acceptance. In saying that an answer to an offer which is made in a manner not satisfying the requirements expressed by the offeror in that behalf is inadequate to produce agreement we regard the matter from the offeror's point of view. The offeror stipulated for the particular method of acceptance and if the offeree does not comply he cannot hold the offeror bound. Regarding the matter from the offeree's viewpoint the position may be expressed somewhat differently. We may suppose that the offeree knows that such and such a method of indicating his acceptance is necessary to produce agreement. Anything falling short of this he knows will not bind him and indeed will not even amount to a counter-offer unless actually notified to the original offeror. From the offeree's point of view, therefore, conduct on his part falling short of what the offeror expressly or impliedly requires to be done by way of acceptance, even though apparently indicating an intention to accept, must be regarded as merely deliberative, and not as showing that absolute and unconditional intention to accept which is requisite to transform offer into agreement.

Thus in *Re National Savings Bank Association, Hebb's Case* (h), Lord Romilly, M.R., speaking of such conduct by an offeree, said: "The mere writing of a line in a book is not, in my opinion, an irrevocable act; and if a person applies for shares in a company, and the directors write down his name in an allotment book, they may at any time before the allotment has been communicated to the allottee alter or cancel the allotment; if it were not so, a mere accident might irrevocably bind the company". So in *Felthouse v. Bindley*, already noticed, Willes, J., remarked (i), "The horse in question being catalogued with the rest of the stock, the auctioneer [the defendant] was told that it was already sold."

(h) (1867), L. R. 4 Eq. 9.

(i) P. 876; E. R. 1040.

It is clear, therefore, that the nephew [offeree] in his own mind intended his uncle [offeror] to have the horse at the price which he (the uncle) had named—£30 15s.: but he had not communicated such his intention to his uncle, or done anything to bind himself". In *Powell v. Lee* (k), the plaintiff was an applicant for the head-mastership of a school and the Board of Managers resolved to appoint him to the position. This resolution, however, was not officially communicated to the plaintiff and subsequently the Board rescinded it. The plaintiff having brought an action for breach of contract it was held that the uncommunicated resolution was not a sufficient acceptance of his offer.

§ 41. Offer and Acceptance Must Coincide Contemporaneously: Rejection, Revocation and Lapse of Offer

The theory of agreement involves not merely that there should be several declarations of will coinciding in respect of content, but also that they should coincide at one and the same time. "It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of acceptance" (l). If, therefore, before the offeree should accept the offer the offeror should manifest an intention to resile from the offer, it will thenceforth be impossible for the offeree by acceptance to produce that apparently contemporaneous coincidence of declared wills which is essential to agreement in the strict sense.

So far as concerns the law of contract, however, the coincidence of wills is not in all cases required to appear to be actually contemporaneous. In some cases a merely constructively contemporaneous coincidence is sufficient. Thus if A makes an offer to B and later resolves to withdraw it and writes a note to that effect which he intends to send by messenger to B, but before the messenger is dispatched B accepts the offer, there will be sufficient agreement for the purposes of the law of contract (m). Nevertheless it is clear that there is not in such a case any apparently contemporaneous coincidence of wills. The coincidence is contemporaneous only in contemplation of law: that is, it is merely constructively contemporaneous.

The principle covering both cases where there is apparently

(k) (1908), 99 L. T. 284.

(l) James, L.J., *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 472; see also *per Thesiger, L.J., Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216, 220.

(m) *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344.

contemporaneous coincidence of declared wills and those where coincidence is merely constructively contemporaneous may be thus stated. An offeror is deemed to continue to adhere to the intention disclosed in his offer until such time as it would be reasonable to suppose that the offeree had come to know that the offeror had abandoned that intention, so that an unqualified and absolute acceptance by the offeree before that time will be regarded as expressing an intention coinciding with the intention in the matter contemporaneously entertained by the offeror (n). It will be reasonable to regard the offeree as knowing that the offeror has abandoned the intention expressed in the offer when the offeree has notified to the offeror the offeree's rejection of the offer; or when the offeror has notified the offeree that the offer has been revoked; or when, the offeror having performed such overt acts as indicate his abandonment of the intention disclosed in his offer, knowledge of those acts comes reliably to the offeree; or when the offer has lapsed by reason of the effluxion of a period of time either expressly or impliedly set by the offeror within which acceptance might be made.

Rejection. If the offeree should communicate to the offeror a rejection of the offer, he could not reasonably suppose that the offeror should thereafter continue to adhere to the offer. Hence an offer once rejected by the offeree can never afterwards be accepted (o). If the offeree desires to change his mind he must either reverse the roles of the parties and himself become an offeror, or he must induce the other party to renew his offer. If, as often happens, during the negotiations for a contract the offeree purports to accept the offer with some alteration in its terms, this amounts in reality to a rejection of the offer and the substitution of a new offer made by himself (p). If A offers to sell his land to B for

(n) *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 314, *per* Lindley, J., 347: "I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. . . . This view . . . appears to me much more in accordance with the general principles of English law than the view maintained by Pothier". In *Henthorn v. Fraser*, [1892] 2 Ch. 27, 31, Lord Herschell said: "I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn". See also *Adams v. Lindell* (1818), 1 B. & Ald. 681; 106 E. R. 250.

(o) *Hyde v. Wrench* (1840), 3 Beav. 334; 49 E. R. 132

(p) *Taylor v. Laird* (1856), 25 L. J. Ex. 329.

£1,000, and B expresses his willingness to buy it for £950, this is a rejection of A's offer and the making of a new offer by B to A to purchase the land for that sum. It is now for A to accept or reject this new offer. But it is too late for B to change his mind and accept the original offer which he rejected.

Nevertheless, it must appear clearly that the offeree did intend that those parts of his answer apparently going beyond or departing from the terms of the offer should affect the subject-matter of the offer and should not merely be expressive of what would in any event have been the legal position, or amount simply to unilateral statements as to matters outside the offer. Thus in *Harris' Case* (q) Harris had offered to take shares in a company, the offer including a term that part of the balance of purchase money was to be paid on allotment. The company's letter of allotment accepting this offer, posted on March 15 or 16 and received by Harris on March 17, purported to require payment of the balance of the allotment money by March 21, and continued: "As the interest warrants attached to the shares bear interest from March 21, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum". It was argued that this clause constituted a departure from the terms of the offer, and converted the alleged acceptance into a rejection and counter-offer, but this contention was rejected. Sir W. M. James, L.J., thus dealt with the matter (r) : "Where there is an acceptance of an offer, if there is to be a term or condition imposed, it must be clearly so stated. otherwise it is to be considered simply as a notification which may have such effect as it ought to have in a Court of law. Here the acceptance was unqualified. . . . It appears to me that the statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent., but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorised to receive payment, but not otherwise. It is a mere notification, not intended to be a new stipulation, and it never was considered by the appellant, or by anybody who received such a letter, as a new term introduced. It would be contrary to the

(q) *Re Imperial Land Company of Marseilles, Harris' Case* (1872), L. R. 7 Ch. 587.

(r) At p. 593.

usage of all mankind to treat this as being the introduction of a new term, altering or affecting the express acceptance of the application for shares" (s).

A counter-offer amounting to a rejection of the original offer must be distinguished from a mere inquiry by the offeree whether the offeror will modify the terms of his offer. If the offeror declines to modify his offer in response to such an inquiry, the offer, unless determined by some other means, continues open for acceptance despite the offeree's inquiry. Thus in *Stevenson v. McLean* (t) the defendants offered to sell to the plaintiffs iron at 40s. per ton, net cash, the offer to remain open for a specified time. Within the time specified the plaintiffs telegraphed the defendants, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give". No reply was received by the plaintiffs to this telegram, and later, and still within the specified time, the plaintiffs telegraphed an unconditional acceptance of the offer. It was held that a good contract had been made, the first telegram being merely an inquiry whether the defendants would modify their offer, and not in any way a rejection of that offer.

Revocation. If, before the offeree accepts the offer, the offeror notifies him of its revocation, then nothing that the offeree may thereafter do will be effective to turn that offer into agreement, whether actual or constructive. But a decision on the part of the offeror to revoke the offer, even though evidenced by overt acts of the offeror, will not constitute an effective revocation if knowledge of it is not brought to the offeree (u). There is no such rule as that the mere posting of a letter may constitute an effective revocation of an offer: knowledge of the revocation must be actually brought to the mind of the offeree. "The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made" (x).

But must the offeror's intention to revoke be notified to the offeree by the offeror or his agent; or will it be sufficient if knowledge of that intention comes to the offeree otherwise than from the offeror or his agent? It would appear from the decision of the

(s) See also *Simpson v. Hughes* (1897), 66 L. J. Ch. 334.

(t) (1880), 5 Q. B. D. 346.

(u) *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344.

(x) Lord Herschell in *Henthorn v. Fraser*, [1892] 2 Ch. 27, 32

Court of Appeal in *Dickinson v. Dodds* (y) that the offeror's intention to revoke will be sufficiently notified to the offeree if the offeree acquires reliable information of it from any source, whether the offeror or his agent or otherwise. In *Dickinson v. Dodds*, Dodds offered to sell property to Dickinson. Shortly afterwards and before any acceptance by Dickinson, Dodds sold the property to Allan. Dodds did not notify Dickinson of the sale, but Dickinson learnt of it from another quarter, and thereupon purported to accept Dodd's offer. It was held by the Court of Appeal that Dodds had clearly intended to revoke his offer, and that as Dickinson had acquired knowledge of this intention, even though not from Dodds or his agent, the offer was to be regarded as effectively revoked and no longer capable of acceptance (z).

Lapse. An offeror, instead of determining his offer by an act (revocation) performed subsequently to the making of the offer, may expressly or impliedly set a limit of time for its acceptance when he makes it, so that the offer will automatically determine if the time-limit passes without the offeree having accepted. In such cases the offer is said to lapse.

Where an expressly defined time limit is set no difficulty arises. But where there is no expressly defined limit of time within which acceptance is required to take place, it may nevertheless be presumed that the offeror did not intend to adhere indefinitely to his offer, and the offer will be regarded as having lapsed after the effluxion of a time reasonable in all the circumstances (a). Thus an offer to sell perishable goods, or goods the market price of which fluctuates rapidly between extreme limits, will obviously call for a more prompt acceptance than one to sell goods of a durable sort and stable price. An offer sent by telegraph may often call for a more prompt reply than one sent by letter (b). In the well-known case of *Ramsgate Hotel Co. v. Montefiore* (c), Goldsmid, on June 8, 1864, applied for shares in a company. On November 23, 1864, the directors purported to accept his offer by allotting him shares. He contended, however, that his offer had lapsed by effluxion of time

(y) (1876), 2 Ch. D. 463.

(z) See also *Cartwright v. Hoogstoel* (1911), 105 L. T. 628. For a criticism of *Dickinson v. Dodds* and *Cartwright v. Hoogstoel*, see Anson, *Principles of Contract* (18th ed.), 34—37.

(a) *Meynell v. Surtees* (1855), 25 L. J. Ch. 257, 259.

(b) *Quenerduaine v. Cole* (1883), 32 W. R. 185.

(c) (1866), L. R. 1 Ex. 109.

before the directors had purported to accept it, and this contention was upheld by the Court of Exchequer.

An offer is also said to lapse where a contemporaneous coincidence of declared wills becomes impossible by reason of the death of the offeror (*d*) or offeree (*e*) before the acceptance of the offer. On a similar principle loss of contractual capacity by either party in any other way, as by insanity, or bankruptcy (*f*), before the offer has been accepted, will in law prevent the offer from thereafter being accepted and converted into agreement. It is to be observed that lapse consequent upon either party dying or losing capacity before the offer has been accepted occurs immediately upon the happening of the particular event, whether or not the other party can reasonably be regarded as knowing of it.

(*d*) Mellish, L.J., in *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 475

(*e*) *Kennedy v. Thomassen*, [1929] 1 Ch. 426; Warrington, L.J., in *Reynolds v. Atherton* (1921), 125 L. T. 690; affirmed in H. L., 127 L. T. 189.

(*f*) *Meynell v. Surtees* (1855), 25 L. J. Ch. 257, 262.

CHAPTER VI

MAKING OF A SIMPLE CONTRACT: (2) CONTRACTUAL AGREEMENTS

§ 42. Offers to Contract and Invitations to Negotiate

In the last preceding chapter we considered the formation of agreement. But, as we have seen (a), all agreements are not contracts. To be a contract an agreement must, among other things, be directed to the creation of legal obligation. Hence the offer upon which a contractual agreement is founded must be an offer to enter into, or become the recipient of, such an obligation. Therefore neither an offer to negotiate merely, nor an invitation to another to make an offer to enter into or become the recipient of an obligation, is such an offer or proposal as, if accepted, will become a contract (b). Nevertheless, if such an offer or proposal be accepted by the person to whom it is addressed entering into the proposed negotiations or submitting the invited offer an agreement will certainly be produced by that acceptance.

Whether any communication between the parties amounts to such an offer as is capable of being converted by acceptance into a contract or is merely an invitation to the other party to submit such an offer or an expression of willingness to treat is a question of legal interpretation which is not always easy of solution. An auctioneer who offers property for sale is not in reality making an offer of a contract. He is merely inviting such offers from intending purchasers. The bidders at the auction are the offerors, and the contract is constituted by the acceptance of one of those bids or offers by the auctioneer. Until and unless he chooses to accept a bid there is no contract even with the highest bidder (c). So he who calls for public tenders for the erection of a building is not making an offer, but is merely inviting offers from tenderers. He

(a) See pp. 4, 12 *et seq.*, *ante*

(b) So in *Harvey v. Facey*, [1893] A. C. 552, it was held that a statement by the defendant to the plaintiff of the lowest cash price at which the defendant would sell an estate, unaccompanied by any expression of willingness to sell to the plaintiff, was not an offer capable of being converted by an acceptance into a contract.

(c) Sale of Goods Act, 1893, s. 58; but see *Warlow v. Harrison* (1858), 1 E. & E. 295; 120 E. R. 920, as to the rights of the highest *bona fide* bidder at an auction *without reserve*, and the discussion of this case in Anson, *Law of Contract* (18th ed.), 40.

is not bound to accept any such tender, even the lowest of them (d). So also a shopkeeper who exhibits goods in his shop window labelled with the prices is not offering to sell those goods. He is merely inviting the public to enter into the shop and offer to buy them. If a customer enters the shop and informs the shopkeeper that he will take a certain article from the window at the price marked upon it, the shopkeeper is at liberty to say that it is not for sale—he is at liberty, that is to say, to reject the offer so made by the customer, even though that offer was invited by himself. The customer is not entitled to insist that he has himself accepted an offer made by the shopkeeper (e).

§ 43. Offers to Individuals and Offers at Large

As we have said, the kind of agreement with which we are particularly concerned is that which is productive of contractual obligation. An obligation is a legal relationship subsisting between two or more individual persons and not a relationship subsisting between such a person on the one hand and persons generally or a group of individually unascertained persons on the other. Then is an offer made to persons at large or to some group of individually unascertained persons such an offer as is capable of being converted by acceptance into a contract? Yes, for the essential thing is not that the offer should be made to an ascertained individual but that it should be accepted by such an individual. In the ordinary case of an offer to some individually designated person, indeed, the person who is to be the other party to the obligation is ascertained by the act of the offeror himself, whereas in the case of offers at large the other party becomes ascertained by his own act in accepting the offer. But what is essential is that at the moment when the offer is to ripen by acceptance into contract the offeror and the party accepting the offer should be ascertained persons who can

(d) In *Spencer v. Harding* (1870), L. R. 5 C. P. 561, the Court had to consider a circular which was (in part) in the following terms: "We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade of A., amounting, etc., and which will be sold at a discount in one lot: payment to be made in cash: the tenders will be received and opened at our office, etc." "But the question is", said Willes, J., "whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt."

(e) See Pollock, *Contract* (11th ed.), 15, and *Solicitors' Journal*, vol. 76, p. 87.

fill the roles of obligor and obligee; the manner in which they become thus ascertained is non-essential.

An example of an offer at large is a public advertisement offering a reward for certain services to be rendered to the advertiser. A man may lose his dog and announce in a newspaper that he will pay 10s. to anyone who returns it to him or gives him information which results in its recovery. This is an offer made to all the world, and capable of acceptance by any person. Anyone who finds and restores the dog thereby accepts the offer and so constitutes between himself and the owner of the dog a binding contract for the payment of 10s. on an executed consideration. Similarly, he who sets up in a public place an automatic machine for the sale of sweetmeats thereby offers a contract of sale and purchase to the world at large. Whosoever puts the necessary coin into the slot of the machine thereby accepts the offer and creates a binding contract between himself and the owner of the machine. If the machine is not in order and fails to deliver the goods, or if the goods when delivered are not of merchantable quality, the purchaser is entitled to an action for damages, just as if he had entered into a contract of sale and purchase in the ordinary way.

A curious example of contracts of this kind is afforded by *Carlill v. Carbolic Smoke Ball Co.* (f), in which the manufacturers and vendors of an appliance for the prevention of influenza advertised that they would pay £100 to any person who, after using this appliance in the specified manner, suffered from influenza within a specified time thereafter. The plaintiff, after using the appliance, caught the disease within that time and sued the defendants for the promised sum. It was held that there was a good contract between the parties and a good cause of action for the breach of it. "It was also said", remarked Bowen, L.J., "that the contract is made with all the world—that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement" (g).

(f) [1892] 2 Q. B. 484; [1893] 1 Q. B. 256.

(g) See also *Spencer v. Harding* (1870), L. R. 5 C. P. 561, 563.

§ 44. Consideration

Consideration Necessary to give Contractual Efficacy to Simple Agreement. As has already been stated (*h*) an agreement (not being by deed) which in all other respects satisfies the requirements of a contract will nevertheless not be productive of contractual obligations unless it is marked by consideration. In the absence of consideration it will be merely *nudum pactum ex quo non oritur actio*. "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved" (*i*).

Agreement Marked by Consideration is a Special Kind of Agreement: Executory and Executed Consideration. To say that an agreement must be marked by consideration means that it must be a special kind of agreement. Consideration is not merely something external to the agreement such as a written memorandum which could be provided for any agreement whatever if the parties were so minded. Nor is it a mere matter of the form in which the intentions of the parties are expressed. It goes to what, beyond matters of form, the parties do or promise to do in entering into the contract. It means that the particular agreement must have resulted either (*i*) from the acceptance of a promise offered conditionally on the offeree's accepting not merely by simply expressing his assent, but by giving some specified promise to the offeror, doing some specified act (other than giving a promise to the offeror or simply expressing assent), refraining from doing some specified act, or giving some specified act in the law; or (*ii*) from the acceptance of an act in the law offered conditionally on the offeree's accepting by giving a specified promise (*k*).

(*h*) See pp. 14, 18, n. (*a*), *ante*.

(*i*) Skynner, C.B., delivering the opinion of the Judges before the House of Lords in *Rann v. Hughes* (1778), 7 T. R. 350, n. (A); 101 E. R. 1014

(*k*) Cf. C. J. Hamson, "The Reform of Consideration", 54 L. Q. R. 233, 234: "So far from being an additional and unnecessary mystery, an accidental tom-tit in an otherwise rational theory of contract, consideration in its essential nature is an aspect merely of the fundamental notion of bargain, other aspects of which, no less but no more important, are offer and acceptance. Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain. Indeed, consideration may conveniently be explained as merely the acceptance viewed from the offeror's side. Acceptance is defined to be the doing of that act (which may be the giving of a promise or the rendering of a performance) which is *requested* by the offeror in exchange for his promise; it is

In the case of the offer of a promise, where the stipulated acceptance consists in the giving of a specified promise the promise of the offeror and the promise of the offeree given in acceptance of the offer constitute each the consideration for the other. Such considerations, as they involve conduct or the possibility of conduct on the part of offeror and offeree in the future, are described as *executory*. The formula of an offer of a promise which upon acceptance will result in a contract based on such executory consideration is: "If you promise to do or refrain from doing this thing for me, I promise to do or refrain from doing this other thing for you". Where the acceptance for which the offeror of a promise stipulates is an act (other than a simple assent or the giving of an undertaking to the offeror) or forbearance, that act or forbearance when given by the offeree in acceptance of the offer constitutes the consideration for the offeror's promise. As it relates neither directly nor indirectly to the future conduct of the offeree but consists in conduct presently performed by him in entering into the contract it is described as *executed* consideration. The formula of an offer of a promise which results in a contract based on executed consideration is: "If you do or refrain from doing such-and-such an act for me, I promise in return to do or refrain from doing such-and-such an act for you".

Both an executed and an executory consideration are involved where an act in the law is exchanged for a promise. A may offer to buy a chattel from B for £1 payable at the end of the month, and if B accepts, the chattel forthwith becomes A's property (1) (*i.e.*, the agreement operates as the act in the law known as a conveyance) and A comes under the obligation of a promise to pay £1 at the end of the month. In such a case the conveyance is an executed consideration for the promissory, *i.e.*, contractual, aspect of the transaction. The promise, on the other hand, is an executory

the response to the offer. An act done at the request of the offeror in response to his promise is consideration; and consideration in its essence is nothing else but response to such a request. To a gratuitous promise the common law notion of offer and acceptance does not apply. We can no doubt separate offer, acceptance and consideration for our convenience in treating of them: but they are logical and interdependent entities abstracted from the one entire reality which is bargain". Street expresses the same idea in somewhat different language. He says (*Foundations of Legal Liability*, Vol. 2, 81). "Between the consideration and the promise there must be a causal relation. The consideration must draw the promise from the promisor, and the promise must be the inducement which causes the promisee to incur the detriment which constitutes the consideration. The two factors must be so far mutual that each may be looked upon in a way as being both the cause and effect of the other. 'The consideration and the promise ought to go together'".

(1) S. 18, Sale of Goods Act, 1893.

consideration for the transaction in its conveyance aspect. A like situation arises where the offer is of an act in the law in return for a promise, as where B offers a conveyance of a chattel in return for a promise by the other party to pay £1 for it at the end of the month.

In the case of a contract executory on both sides it is immaterial which of the parties assumes the role of offeror. It is likewise immaterial in the case of a contract based on an executed consideration of an act in the law. The seller may offer and the buyer accept or *vice versa*. But in the case of a contract based on an executed consideration of a simple act or forbearance the offer must necessarily proceed from the party who provides the promise. It cannot proceed from the other party for it is manifestly impossible for a party to offer the doing (as distinct from the repetition) of an act or forbearance already done (11).

Consideration must move from the Promisee. A contractual consideration, then, consists in some act (not being a simple assent), forbearance, act in the law or promise given by the promisee in return or exchange for the promise. A binding contract based on simple agreement consists of a promise by one party in consideration of some act, forbearance, act in the law or promise given by the other party. That is to say, consideration is something which proceeds from the promisee himself, and not from a stranger to the contract (12). In the language of the law the consideration must *move* from the promisee. A contract between John and Peter that John will transfer land to Peter in consideration of receiving £1,000 from Stephen is invalid for want of consideration. Peter has neither promised nor done any act in exchange for the promise so made to him by John. As between these two the promise is gratuitous and amounts merely to an unenforceable *nudum pactum*. Nevertheless there is no legal reason preventing any man from contracting for a benefit to be received not by himself, but by a third person who is a stranger to the contract. Stephen may, if he thinks fit, contract with John that John shall transfer his land to Peter in consideration of the payment or promise of £1,000 by Stephen.

(11) Cf. pp. 124, 125, *post*.

(12) *Fleming v. Bank of New Zealand*, [1900] A. C. 577, in the Privy Council appears to decide that for the present purpose an agent is so far identified with his principal that consideration from the agent is equivalent to consideration from the principal, even though the principal did not authorise the giving of the consideration and did not subsequently ratify it. It may be doubted, however, whether any such principle can be reconciled with the decision of the House of Lords in *Dunlop v. Selfridge*, [1915] A. C. 847. See also *Vandepitte v. Preferred Accident Insurance Corporation*, [1933] A. C. 70, 78, and *McEvoy v. The Belfast Banking Co.*, [1935] A. C. 24, 43.

Such a contract would be binding as between Stephen and John, but at common law would confer no rights on Peter. Peter is a stranger to the contract. Accordingly at common law if the contract is broken it must be enforced by Stephen, not by Peter. At common law no one can sue upon a simple contract to which he is not a party (n). In equity, however, the position is different. If Stephen entered into the contract as a trustee for Peter then Peter will acquire rights under the contract and under certain conditions he will be able to enforce it (o).

It may be here observed that a person cannot be a party to an ordinary simple contract and yet not a party to the consideration, for such a contract is an agreement marked by consideration. Thus Stephen and John and Peter may agree together that John in consideration of £1,000 promised him by Stephen will pay an annuity to Peter. Here the only contract is between Stephen and John, for it is only between them that there is an agreement marked by consideration. Between Peter on the one hand and John and Stephen on the other, however, there is no consideration and therefore, although Peter is a party to the agreement he is not a party to any contract (p). Conversely a person cannot be a party to the consideration and yet not to the contract. Consideration is that which the promisee, by the act of entering into the agreement, gives to the promisor in exchange for the promise. In the absence of agreement there can be no such thing as consideration, which is merely one side of the agreement. But agreement (directed to the defining and creating of obligation) marked by consideration is contract. Therefore one who is a party to the consideration must necessarily be also a party to the contract (q).

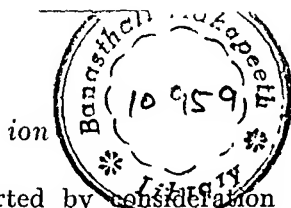
The same Act may or may not Constitute Consideration According as it has been dealt with by the Parties. Although consideration must move from the promisee, merely that an offer of a promise has been accepted by the offeree's doing some act (other than expressing his simple assent) or refraining from doing some act does not necessarily mean that that promise is supported by consideration.

(n) *Tweddle v Atkinson* (1861), 1 B. & S. 393; 121 E. R. 762.

(o) See Chap. XVII, pp. 424 *et seq.*, *post.*

(p) See *Dunlop v Selfridge*, [1915] A. C. 847, 853, 855, 858. See also and contrast *Thomas v. Thomas* (1842), 2 Q. B. 851; 114 E. R. 330, and *Tweddle v. Atkinson* (1861), 1 B. & S. 393; 121 E. R. 762. It will be noticed that contract is often loosely used in the authorities to mean agreement.

(q) The rule that in the case of a contract made in consideration of marriage the issue of the marriage may be regarded as within the marriage consideration is an anomalous exception to the general principles stated in the text. See p. 607, *post.*

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Nor is a promise necessarily supported by consideration because under the agreement of which it is a term the parties contemplate that the promisee may do or forbear from doing some act (r). Before any act, forbearance or promise which is given in acceptance of an offer of a promise can be regarded as a consideration for that promise it must appear that it was bargained for by the offeror as the price of the promise which he offered. That is to say, it must appear that the offeror tendered his promise to induce the offeree to supply the specified act, forbearance or promise. So also before any act, forbearance or promise which is offered in exchange for a promise can be regarded as consideration for the offeree's promise, if given, it must appear that the offeree gave his promise as the price of and to secure what was offered (s). The notion of something appearing to have been bargained for and bought with the promise is essential in the doctrine of consideration (t).

Thus, a father may write to his son: "Whenever you are in financial difficulty come to see me and explain your position to me, and I will give you what you need up to £1,000". The son may thereafter incur some trouble and expense in going to see his father and in presenting to him a statement of his affairs; but he could not thereupon enforce his father's promise on the ground that he had thereby supplied an onerous executed consideration for it. The father made no bargain with his son. He stipulated for no consideration executed or executory. He merely offered a gratuitous promise of assistance on certain conditions. These conditions may

(r) Cf. *per* Byles, J, in *Shadwell v. Shadwell* (1860), 9 C. B. (N.S.) 159, 177; 142 E. R. 62, 69: "Suppose a defendant to promise a plaintiff—'I will give you £500 if you break your leg'—would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise if the testator had said, 'I will give you £100 a year while you continue in your present chambers?' I conceive that the promise would not be binding for want of a previous request by the testator."

(s) "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A. C. 847, 855, adopting the definition of Sir Frederick Pollock now appearing in *Principles of Contract* (10th ed.), 164.

(t) Cf. Leake, *Contracts* (7th ed.), 6: consideration "may be described generally as some matter accepted or agreed upon as a return or equivalent for the promise made. The fact of bargaining for and giving an equivalent for the promise serves to show that the parties act with deliberation." Willmshurst, *Real Property* (22nd ed.), 79, also defines consideration so as to bring out the bargain element: "a conveyance or a promise is said to be made for valuable consideration, when something is exacted in return for it: not necessarily the payment of money, but anything which is a burden on the party accepting the conveyance or promise, and on which the other sets a value." See also Street, *Foundations of Legal Liability*, vol 2, 81, quoted p. 98, n. (k), ante.

have been fulfilled, but they have not for that reason been transformed into a consideration for his promise.

So in *Foster v. Dawber* (u), J. C. lent to the defendant two sums of £500 upon the security of the defendant's promissory notes. J. C. afterwards informed the defendant that he had decided to make him a gift of the £1,000 secured by the notes and directed the defendant to write out a receipt for that sum and interest for J. C. to sign. Defendant thereupon bought a piece of paper stamped with a 10s. receipt stamp, and J. C. having again requested him to write out the receipt, he did so, and the receipt was duly signed by J. C. J. C.'s executor having afterwards sued the defendant on the notes, the defendant pleaded the receipt, and the question was whether there was any consideration to support it. The Court of Exchequer held there was not, Parke, B., saying (x): "the defendant must show a bargain made with him, that, as a consideration for Clark's giving up the two promissory notes, the defendant should purchase a piece of paper marked with a 10s. receipt stamp, and write out a receipt upon it, and suffer Clark to sign the same; and that the agreement between the parties was, that £1,000 should be the compensation to be paid for doing this. If the evidence be looked at, it is impossible to suppose that such was the real meaning of the parties. There is nothing in the nature of a bargain that the testator would make the defendant a present of the money, if the defendant would be at the trouble of purchasing a stamp and writing out a receipt . . . it is too much to say that it was parcel of the bargain that the £1,000 should be given up if the defendant wrote the receipt, but should be retained by the testator if he did not".

The case of *De Cicco v. Schweizer* (y), before the New York Court of Appeals, affords another illustration. In that case there was a written promise by a father to pay an annuity to his daughter. The writing opened with a recital that the daughter was engaged to be married to one Gulinelle, and then continued: "Now in consideration of all that is herein set forth the said [father] promises and expressly agrees by the present contract to pay etc." One of the arguments submitted to the Court was that the marriage was merely the occasion for, or a mere condition precedent to the performance of, the father's promise, and no consideration for it. The Court, however, rejected this argument and Cardozo, J., thus stated

(u) (1851), 6 Ex. 839; 155 E. R. 785.

(x) P. 849, E. R. 790.

(y) (1917), 221 N. Y. 431.

the Court's reasons: "The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing' (z). 'Nothing is consideration that is not regarded as such by both parties' (a). But here the very formality of the agreement suggests a purpose to effect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the 'consideration' for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit" (b).

As a last illustration we may notice the recent case of *Wyatt v. Kreglinger* (c), in the Court of Appeal. In that case the defendants had written to the plaintiff: "Upon your retirement on July 31 next we have decided to grant you a pension of £200 per annum, payable by monthly instalments. You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade, and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted)". This offer was accepted by the plaintiff. The defendants after some years declined to continue paying the pension and the plaintiff sued for breach of contract, claiming alternatively a declaration that the defendants' offer and his acceptance constituted a valid contract. One of the questions raised was whether there was any consideration for the defendants' promise. It was argued for the plaintiff that the defendants in their offer had stipulated that he should promise not to work in the wool trade and that by accepting the offer he had given this promise and hence had provided a sufficient con-

(z) Holmes, Common Law, 292. On the same page Holmes wrote: "It appears to me that it has not always been sufficiently borne in mind that the same thing may be a consideration or not, as it is dealt with by the parties". *Fire Insurance Association v. Wickham*, 141 U. S. 564, 579.

(a) *Philpot v. Gruniger*, 14 Wall. 570, 577; *Fire Insurance Association v. Wickham*, *supra*.

(b) See also Street, *Foundations of Legal Liability*, vol. 2, 70.

(c) [1933] 1 K. B. 793.

sideration for the defendants' promise to pay him a pension. The case came first before Macnaghten, J., who decided against the plaintiff's contention. The plaintiff then appealed and in the Court of Appeal the case was ultimately decided against the plaintiff on a different ground, counsel for the defendants not being heard on the present question. Neither Greer, L.J., nor Slessor, L.J., therefore, expressed a final opinion on the question, although Greer, L.J., "inclined to take the view" that the plaintiff's contention was well-founded; and Slessor, L.J., without being so definite as this, nevertheless also seemed to regard that contention with favour. Scrutton, L.J., however, expressed a clear opinion against the plaintiff's argument, adopting Macnaghten, J.'s judgment on the point. The view of the matter which commended itself to Scrutton, L.J., and Macnaghten, J., was, in effect, that the plaintiff's refraining from re-entering the wool trade was merely a condition precedent set by the defendants to the performance of their gratuitous promise of a pension. "The Judge below", said Scrutton, L.J. (d), "has exactly expressed the view I take of these words, reading them in a letter which in my opinion starts by being a letter of gratuitous offer imposing no legal obligation. The learned Judge says: 'The opinion I have formed as to the meaning of the first paragraph [is] that the pension was a voluntary gratuitous payment which the defendants were at liberty to give or withhold at any time at their discretion. I think the words: "You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade", are merely an intimation that they did not desire Mr. Wyatt to enter into the wool trade, and that if he did enter into the wool trade, he must not expect them to continue the payment.'"

Whether in any particular case that element of bargain which is an essential constituent of consideration is present in the agreement is a question of interpretation. What is the meaning in that behalf of the acts and words, whether written or spoken, by which the parties arrived at their agreement? If the agreement contains an express statement in the matter, as, *e.g.*, in the case where a nominal consideration is expressly declared (e), there will be no difficulty in answering this question. In other cases one factor which will indicate that the conduct of a party in entering into an agreement is to be regarded as consideration for the promise of the

(d) At p. 805.

(e) See p 106, *post*

other party is that that conduct was requested by the latter in offering his promise. "It clearly follows . . . that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind that guarantor, who has promised to pay the debt. . . . If a request is to be implied from the circumstances, it is the same as if there were an express request" (f).

If what thus appears to have been bargained for by the offeror as consideration for his offered promise is itself a promise, then this latter promise will without more and unless the contrary expressly appears, be regarded as given for the purpose of obtaining the offered promise, and the offered promise will therefore be regarded as constituting a consideration for the promise given in acceptance of the offer.

Where there is any doubt whether particular conduct is to be regarded as a consideration then on the principle *pacta sunt servanda* the Courts will tend to resolve the doubt in favour of the conduct being a sufficient consideration (g).

Consideration and Motive or Inducement. It is sometimes said that consideration must be distinguished from motive or inducement (h). Nevertheless the consideration is generally the motive or inducement which leads the promisor to give his promise and the promise is usually what moves the recipient of it to provide that consideration. Thus A offers B a promise that if B will ship him a specified quantity of oranges he will pay B £300 fourteen days after shipment. B accepts by shipping the oranges and a contract is thereby formed. Here the desire to secure the oranges was the motive or inducement leading A to offer his promise, and the promise is what induced B to ship the oranges.

In fact when we say that consideration must be distinguished from motive we really mean that consideration is a special and

(f) *Crears v. Hunter* (1887), 19 Q. B. D. 341, per Lord Esher, M.R., 345. See also *Shadwell v. Shadwell* (1860), 9 C. B. (N.S.) 159, per Erle, C.J., 174; 142 E. R. 62, 68; *Carlill v. The Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, per Bowen, L.J., 271; *Victors v. Davies* (1844), 12 M. & W. 758; 152 E. R. 1405; Bullen & Leake, *Precedents of Pleadings* (3rd ed.), 37.

(g) Street, *Foundations of Legal Liability*, vol. 2, 71; for examples see *Shadwell v. Shadwell* (1860), 9 C. B. (N.S.) 159, 142 E. R. 62; *Taylor v. Manners* (1865), L. R. 1 Ch. 48; *Wilkinson v. Oliveira* (1835), 1 Bing. N. C. 490; 131 E. R. 1206; *Hart v. Miles* (1858), 4 C. B. (N.S.) 371; 140 E. R. 1128; *Wyatt v. Kreglinger*, [1933] 1 K. B. 793; see also per Holmes, C.J., in *Martin v. Meles* (1901), 179 Mass. 114.

(h) "It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing as consideration": Patteson, J., *Thomas v. Thomas* (1842), 2 Q. B. 851, 859; 114 E. R. 330, 333.

conventional kind of motive and that motive or inducement generally is not equivalent to consideration. First of all consideration is only what is declared by the express or implied terms of the agreement to be the motive or inducement for the undertaking. But a party may have a motive beyond that declared in and constituting the consideration for his contract, as *e.g.*, a desire to secure the goodwill of the other contracting party by dealing with him on favourable terms. It is only the motive or inducement declared in the agreement, however, which can be taken into account by the law. Consideration is something which inheres in the agreement; and the agreement is a combination of the declared wills of the parties. Moreover, the consideration declared in the agreement, the conventional motive or inducement, may in fact be no part of the real motive of the promisor at all. This is so in cases of contracts based on a nominal consideration. Here the consideration is given and accepted for the sole purpose of making the agreement binding in law. For example, a father may promise to settle property on his daughter in consideration of the payment by her to him of a nominal sum, while his real motive may be to render her economically independent of her husband. But in ordinary cases the Courts do not go into the adequacy of the declared consideration (*i*), nor yet into whether it was the real inducement for the undertaking. It is sufficient that the parties should have agreed in declaring it to be the inducement (*k*). Secondly, what is declared by the agreement to be the inducement or motive leading to the undertaking will not amount to a consideration unless it is of such a nature as could constitute a consideration. A, who has in the past received much kindness at B's hands, may enter into an agreement with B to render him some service and may expressly declare that he does so in consideration of those past kindnesses; but this would be no consideration in law (*l*).

Gratuitous Bailment and the Rendering of Gratuitous Services Generally. That what is consideration depends on (*inter alia*) the intention in that behalf of the parties as appearing from their agreement renders it impossible to bring within the scope of that doctrine the case of a bailee who undertakes the bailment gratuitously or the case of a person who gratuitously performs some other service

(i) See p. 115, *post*.

(k) Holmes, *Common Law*, 293—295.

(l) *Eastwood v. Kenyon* (1840), 11 A. & E. 438; 113 E. R. 482. See pp. 124, 126 *et seq.*, *post*.

for another. In each of these cases there will, of course, be an agreement. Moreover, in each case there will be conduct on the part of the promisee (bailor or recipient of the services) which could in law constitute a consideration. In the bailment such conduct is to be found in the delivery of the chattel by the bailor to the bailee. In the case of the rendering of services it may be found in the promisee's trusting in the skill, competence and care of the promisor, and exposing himself to the risk of damage in the absence of such skill, competence and care (*m*). The difficulty, however, is that in neither case have the parties by their agreement treated these particular matters as consideration. It is clearly settled, indeed, that where there is merely an agreement arising from an offer of gratuitous bailment or other gratuitous services, or an offer to accept gratuitous services whether in the form of a bailment or otherwise, followed by simple assent, no action can be brought against the person who was to become bailee or render the services if he refuses to accept the chattel or enter upon the performance of the services. "But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*" (*n*). It is sometimes said, however, that should the promisor enter upon the performance of his gratuitous promise and perform it amiss then he will be liable in contract (*o*). There is no doubt that for such misperformance an action may often be brought; but the better view appears to be that it is an action of tort, and not contract.

Gratuitous Bailment. Let us first consider the case of a gratuitous bailment. A requests his friend B gratuitously to store a box of books for him during his (A's) absence on holiday, and upon B's consenting duly delivers the books to B. Suppose that while the books are in B's possession they are damaged, or stolen, or that B refuses to deliver them to A. Certainly there is an agreement; but what act on A's part have A and B treated as consideration for any promise which these facts may disclose on B's part? The only possible one is the delivery of the books by A to B. But this was not stipulated or bargained for or requested by B (*p*). On the

(*m*) There might be other acts as well, such as allowing the promisor to enter upon the premises, or to handle a chattel, of the promisee.

(*n*) Gould, J., in *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 92 E. R. 107; *Elsee v. Gatward* (1793), 5 T. R. 143; 101 E. R. 82; *Balfie v. West* (1853), 13 C. B. 466; 138 E. R. 1281.

(*o*) Halsbury, *Laws of England* (2nd ed.), vol. 7, 147; Pollock, *Contract* (11th ed.), 143; Anson, *Contract* (14th ed.), 109.

(*p*) Cf. *Bainbridge v. Firmstone* (1838), 8 A. & E. 734; 112 E. R. 1019.

contrary, possession of the books was accepted by B at the request of A. Then how can it be said that delivery of the books by A to B was regarded by them as anything more than the performance of a condition necessary to be performed that B might carry out his promise to store the books?

For the view that in such a case there is a contract and that the consideration for it consists in the detriment to the bailor in parting with possession of the goods, *Coggs v. Bernard* (q) is commonly cited. It was indeed said by Holt, C.J., in that case "that the owner's trusting him [the defendant] with the goods is a sufficient consideration to oblige him to a careful management". But, as Mr. Justice Holmes has shown (r), this statement had no reference to a consideration for a contract. The action was in case, for a tort, *viz.*, negligent injury to chattels. It is true that the declaration contained the word *assumpsisset*, but this was to introduce a charge of negligence. The pleader was merely stating the circumstances from which the Court was to infer a duty in the defendant the breach of which would found an action in tort. No man can become a bailee without his consent (s), and hence one voluntarily accepting possession of goods by way of bailment may not inappropriately be said thereby to *assume* or undertake the obligations which the law imposes on him by reason of his having taken the goods into his possession (t). But the *assumpsit* did not mean

(q) (1703), 2 Ld. Raym. 909; 92 E. R. 107.

(r) Common Law, 196-7, 292

(s) *Lethbridge v Phillips* (1819), 2 Stark. 544; 171 E. R. 731; *Howard v. Harris* (1884), Cab. & Ellis 253

(t) See *Corbett v. Packington* (1827), 6 B. & C. 268, 272, 273; 108 E. R. 451, 453 "In *Coggs v. Bernard*", said Bayley, J., "the declaration certainly contained the word *undertook*, but no consideration for a promise was shown, and the plea was not guilty [if the action had been in contract it would have been *not assumpsit* Bullen & Leake, Pleadings (3rd ed.), 460, 697]. There was only one count in the declaration. . . . I think it was properly held to be a count in tort, one essential ingredient to a count in contract, *viz.*, a consideration, not being stated." And Littledale, J., remarked "*Coggs v. Bernard*, and the other cases of that class, are very different from the present, for there, although the word *undertook* was found in the declaration, it was inserted merely as inducement. . . ." With these opinions may be contrasted a passage in the judgment of the Court of Exchequer Chamber in *Whitehead v. Greetham* (1825), McCle. & Yo. 205; 148 E. R. 384, in which that Court purported to apply *Coggs v. Bernard* to an action of *assumpsit*. In *Whitehead v. Greetham* the declaration contained an allegation that the plaintiff at the *special instance* and *request* of the defendant paid to the defendant £700 to be applied by the defendant in certain ways and that the defendant then and there promised so to apply the money. All that the Court of Exchequer Chamber actually decided was that after verdict the mere omission from the declaration of an allegation stating in so many words that the defendant gave his promise in consideration of the plaintiff's paying him the money could not be relied upon as a ground for attacking the judgment given in favour of the plaintiff. See Hullock, B., *arguendo*, 207; E. R. 386, and the argument of counsel for the plaintiff, 210; E. R. 387. At that stage the allegation

contract: "This is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself" (u).

It seems, indeed, impossible to discover in the cases any claim which a gratuitous bailor could maintain against his bailee which could not be regarded as an action of tort. If the chattel has been negligently lost or destroyed the bailor will have an action which would formerly have been in detinue (x). If it is wrongfully and wilfully destroyed, disposed of or detained by the bailee the bailor may sue for the tort of conversion (trover) (y). And if the bailee should intentionally or negligently damage the chattel the bailor will have an action in tort which would formerly have been an action of case (z). There is no authority which suggests that a gratuitous bailee is under any other duty (as, e.g., to be absolutely responsible for the goods (a), or to take the goods to the owner (b)) than those enforced by actions in tort derived from trover, detinue and case.

On the other hand there is sufficient authority that bailment can subsist without contract (c). It seems preferable, therefore, to regard cases of gratuitous bailment as outside the sphere of contract altogether. In such cases the bailee's action is "*ex malefacto* not *ex contractu*" (d).

that the plaintiff paid the money, to be applied as alleged, to the defendant at the defendant's request, and that the defendant then and there promised to apply the money to the purposes for which he had requested its payment, was a sufficient allegation that the defendant gave his promise in consideration of the plaintiff's payment. Cf. p. 104, *ante*. There was therefore no need for the Court to rely on *Coggs v. Bernard* and other cases in which there was no such request but a purely gratuitous bailment or other gratuitous rendering of services, and it is submitted that the Court's remarks on this aspect of the case were *obiter* and, being contrary to principle, should be disregarded.

(u) Holt, C.J., 2 Ld. Raym. p. 919; 92 E. R. p. 113. The *assumpsit* in such cases was simply a way of saying that in the particular circumstances there was that "proximity", to use a modern term, between plaintiff and defendant which would justify the Court in holding that the defendant owed a duty of care to the plaintiff. Cf. Lord Atkin in *Donoghue v. Stevenson*, [1932] A. C. 562, 580-1; see also 17 Harvard L. R. 126-7.

(x) Salmond, Torts (10th ed.), 284.

(y) *Ibid.*, and at p. 294.

(z) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 92 E. R. 107; Salmond, Torts (6th ed.), 412-3.

(a) "The counsel", said Taunton, J., in *Doorman v. Jenkins* (1834), 2 A. & E. 256, 260; 111 E. R. 99, 101, "properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable except in the case of gross negligence."

(b) *Corbett v. Packington* (1827), 6 B. & C. 268; 108 E. R. 451; *Turner v. Stallibrass*, [1898] 1 Q. B. 56, 60.

(c) Winfield, *Province of the Law of Tort*, 97-99; *R. v. Robson* (1861), 31 L. J. M. C. 22; *R. v. McDonald* (1885), 15 Q. B. D. 323.

(d) Whitlock, J., in *Symons v. Darknoll*, Palmer 523; 81 E. R. 1202. See also C. B. Davidge, *Bailment*, 41 L. Q. R. 436, 438. Markby, *Elements of*

Gratuitous Services. There is perhaps even more difficulty in supporting by reference to normal principles of contract cases where an action is allowed in respect of the misperformance of a promise of gratuitous services than there is in thus supporting cases of gratuitous bailment (e). Before we admit these cases as arbitrary exceptions to the doctrine of consideration, therefore, we may first inquire whether, as in the case of gratuitous bailment, the principles of some other branch of the law will not adequately cover them.

Often enough, indeed, such misperformance will take the form of negligent injury to the person or corporeal property of the promisee. Thus A, having gratuitously promised to carry in his motor car his friend B, may drive so negligently while performing his promise that a collision results and B is injured. Or A, pursuant to a promise given by him to B, may gratuitously perform some work on a chattel belonging to B and remaining in B's possession, and be so negligent in the course of doing the work that the chattel may be damaged. In such cases there can be no doubt that the promisee would have an action in tort in respect of the harm suffered by him (f); and all the more so if the injury were intentional and not merely negligent. As Grose, J., said (g), "whether the work were or were not to be performed for hire, the defendant was not to injure the plaintiffs. . . ."

Cases of the sort mentioned in the last preceding paragraph were, in Mr. Street's view (h), the only cases in which an action for the misperformance of a gratuitous promise should be allowed. Such actions, he said, were actions of negligence, and negligence he did not consider to be a separate tort in itself, but merely an ingredient in those torts consisting "in physical hurt to the body or in forceful damage to property". Hence, he argued, only where the damage suffered by a gratuitous promisee was of this kind could he have a remedy.

Mr. Street was therefore led to condemn such cases as *Wilkinson v. Coverdale* (i). In that case the plaintiff alleged that the defendant had gratuitously promised to procure for him (the plaintiff)

Law (5th ed.), p. 316, sec. 642; E. Grueber, A Difficulty in the Doctrine of Consideration, 2 L. Q. R. 33; Holdsworth, History of English Law (3rd ed.), vol. 3, 449—450. Cf. Pollock, Contracts (11th ed.), 143, footnote (37).

(e) Winfield, Province of the Law of Tort, 99.

(f) *Harris v. Perry & Co.*, [1903] 2 K. B. 219; *Elsee v. Gatward* (1793), 5 T. R. 143; 101 E. R. 82; *Sharp v. Avery*, [1938] 4 A. E. R. 85.

(g) *Elsee v. Gatward*, p. 151; E. R. 87.

(h) Foundations of Legal Liability, vol. 2, 49—51; vol. 1, 71—72.

(i) (1793), 1 Esp. 75; 170 E. R. 284: "a special action on the case, against the defendant for negligence".

an insurance against fire and had negligently failed to have inserted in the policy a clause which would have afforded protection against a loss which actually happened. Lord Kenyon, C.J., at *nisi prius*, ruled that if these allegations were made out, the defendant would be liable in tort for the resulting damage. "This ruling", wrote Mr. Street, "... is clearly untenable. There was no infliction of hurt or damage such as would have supplied a cause of action for negligence, and there was no consideration such as would support a contractual obligation."

It may be doubted, however, whether Mr. Street was correct even when he wrote (*k*) in saying that negligence could not be a tort in itself. Certainly that view could not be maintained at the present day (*l*). And if negligence is a tort in itself, then any damage of a legally recognisable kind resulting directly from, or being the natural and probable consequence of (*m*), a negligent act (whether committed in the course of performing a gratuitous service or not) will be actionable. This principle, which is a principle of the law of torts, quite adequately explains such cases as *Wilkinson v. Coverdale*, which should therefore be placed in that department of the law rather than by strained reasoning brought under the head of contract; or worse, condemned as unsound (*n*).

Is Consideration Benefit to the Promisor or Detriment to the Promisee? It is very commonly said that consideration may either be a present benefit to the promisor or a promise the performance of which would be a benefit to him; or else a present detriment to the promisee or a promise on his part the performance of which

(*k*) 1906.

(*l*) See *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85, 103. "It is clear", said Lord Wright, "that the decision [*Donoghue v. Stevenson*, [1932] A. C. 562] treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty, and still less as having any dependence on contract".

(*m*) See *Domine v. Grimsdale*, [1937] 2 A. E. R. 119, 124.

(*n*) In *Nocton v. Ashburton*, [1914] A. C. 932, 956, a case concerning damage which was neither "physical hurt to the body nor forceful damage to property", Lord Haldane, L.C., said: "The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort for negligence in breach of a duty imposed upon him" (*italics not in original*). In *Banbury v. Bank of Montreal*, [1918] A. C. 626, where it was sought to make a bank liable for gratuitous, but allegedly negligent, advice, counsel argued that liability in respect of gratuitous services was limited as Mr. Street suggested: p. 634. Lord Atkinson, noticing this contention, said (p. 690): "I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts". See also note, *Gratuitous Undertakings*, 17 *Harvard L. R.* 126.

would be a detriment to him. A much quoted definition is: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other" (o). Nevertheless for a definition this says too much.

Inasmuch as consideration must move from the promisee (p), it or the performance of it must necessarily be a detriment to him (q). Detriment is here used in a special sense. It does not mean that the contract as a whole should be unprofitable to the party providing the consideration. It looks merely to the act or promise constituting the consideration and it involves that the party providing the consideration should, or should promise to, do, suffer or forbear from doing something which he otherwise would be entitled not to do, suffer or forbear from doing. In this sense it is a detriment to me if I permit you to walk over my land, even though I do not set a penny's value on the permission, for I would have been entitled to prevent you from walking there had I so wished (r).

Every consideration, therefore, consists in a present or contemplated detriment to the promisee. Most considerations also involve a corresponding benefit to the promisor. In other words the consideration of a contract is usually beneficial as regards one of the parties and onerous as regards the other: as in the case of payment or promise of money as the price of goods sold, or the promise of services to be rendered in return for wages. In the ordinary type of legally enforceable bargain each party obtains something of benefit to himself from and at the cost of the other party.

Nevertheless benefit to the promisor is an accidental and inessential feature of consideration. "If the consideration puts the other to charge, though it be no ways profitable to him who made

(o) *Currie v. Misa* (1875), L. R. 10 Ex. 153, *per* Lush, J., delivering the judgment of the majority of the Exchequer Chamber, 162.

(p) See p. 99, *ante*

(q) Salmond, *Essays in Jurisprudence and Legal History*, 195-6.

(r) Cf. Pattenon, J., in *Thomas v. Thomas* (1842), 2 Q. B. 851, 859; 114 E. R. 330, 333. "Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff or some detriment to the defendant [*sic.*, read, detriment to the plaintiff or some benefit to the defendant]; but at all events it must be moving from the plaintiff". In this passage what we have called detriment is described as "something which is of some value in the eye of the law, moving from the plaintiff"; and it is this which is stated to be an essential element in consideration. The word *detriment* itself is used by Pattenon, J., in a loose sense to indicate that the party providing the consideration regards it as of a value capable of appreciation in terms of money. Detriment in this loose sense may, not must, be present, said the learned Judge.

the promise, yet this shall be a good consideration to raise a promise" (s). It is a matter of law entirely immaterial whether the detriment or contemplated detriment to the promisee should be of any benefit to the promisor, or indeed to any person at all. A good consideration for the promise of A to pay B £1,000 may be the promise of B to transfer property to C. This transfer may be no matter of benefit to A, but it is a matter of loss to B; and B has accordingly given sufficient consideration in exchange for A's promise to him. Or again, A, in consideration of B's extending credit to C, may guarantee payment of the resulting debt from C to B. The consideration for A's guarantee will be a benefit to C, not to A. In *Bainbridge v. Firmstone* (t) the contract declared on was that the defendant, in consideration of the plaintiff's permitting him to weigh certain boilers, would leave and give up the boilers in as good condition as when he got them. It was argued there was no sufficient consideration but the Court rejected this argument. "It seems to me that the declaration is well enough", said Lord Denman, C.J. "The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave." And Patteson, J., said, "I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time" (u).

We may conclude, therefore, that detriment, present or contemplated, to the promisee is the invariably essential element of consideration, and not benefit or contemplated benefit to the promisor. "Any number of cases can be cited wherein it has been held that detriment to the promisee, unaccompanied by any benefit

(s) *Doddridge, J.*, in *Bagge v. Slade* (1616), 3 Bulst 162; 81 E. R. 137. So in *Pillans v. Van Merop* (1765), 3 Burr. 1663, 1673; 97 E. R. 1035, 1040, Yates, J., said: "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking".

(t) (1838), 8 A. & E. 743; 112 E. R. 1019.

(u) See also *per* Bowen, L.J., in *Carlill v. The Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 271: "The definition of 'consideration' given in Selwyn's *Nisi Prius* (8th ed.), p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant* (3 Scott 238, 250), is this: 'Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant'". It very clearly appears from this definition that benefit to the promisor may or may not be present in a valid consideration, but detriment to the promisee must be.

to the promisor, will support a promise, but not one can be cited where a benefit to the promisor, unaccompanied by a detriment to the promisee, has been held to be sufficient to support a unilateral promise" (x).

Although, however, benefit or contemplated benefit to the promisor is not an essential element of consideration, that the promisor receives or is promised a benefit may be of evidentiary significance in regard to the question whether what is alleged to be consideration was bargained or stipulated for by the promisor in return for his promise. If it should appear that what is alleged to be consideration is a present or contemplated benefit to the promisor the Courts will no doubt readily infer that he bargained and stipulated for it and hence that it is a consideration for his promise (y). In *Vanbergen v. St. Edmunds Properties, Ltd.* (z) V presently owed a sum of money to E. An agreement was made between V and E, acting by his solicitors, that if V would pay the amount of the debt into a bank in the country for the credit of the solicitors in London, that would satisfy V's debt to E, and a bankruptcy notice which E had issued for part of the debt would not be served. V carried out his part of the agreement, but the solicitors nevertheless served the bankruptcy notice upon him. He therefore sued for damages for breach of contract. The question was whether there was any consideration to support the alleged contract. Lord Hanworth, M.R. (a), pointed out that there was no express request by E that V should pay in this way; and then said: "But they reaped no advantage; there was nothing moving towards them which could be deemed to be a consideration. . . ." Lawrence and Romer, L.JJ., described the effect of the agreement (b) as being to confer on V two purely voluntary indulgences or concessions. There being, therefore, neither express request by E for payment at the bank in the country nor any advantage to E which could lead the Court to infer that E had requested or bargained for this method

(x) Street, *Foundations of Legal Liability*, vol. 2, 68; see also Salmond, *History of Contract*, 3 L. Q. R. 166, at 172, reprinted in *Select Essays in Anglo-American Legal History*, vol. 3, 321, at p. 328; Pollock, *Contract* (10th ed.), 171-2; Holdsworth, *History of English Law*, vol. 8, 10-11; Lord Wright, 49 *Harvard L. R.*, p. 1227, reprinted in *Legal Essays and Addresses*, pp. 289-290.

(y) Langdell, *Summary of Law of Contracts*, s. 64.

(z) [1933] 2 K. B. 223.

(a) At p. 234.

(b) At pp. 236-7, 239.

of payment, it was held that the agreement was void as a contract for lack of consideration (c).

The Detriment Element in Consideration. Inasmuch as detriment, present or contemplated, is an essential element in consideration, we must consider what the law regards as a detriment.

Adequacy of Consideration. It is first to be observed that in deciding whether what is alleged to be a consideration exhibits this element of detriment, the Courts do not go into the adequacy of the alleged consideration as an equivalent or exchange for the undertaking. "It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration" (d). In the words of Lord Blackburn (e), "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced" (f). The law, though it insists that a contract shall amount to a bargain involving something done or promised on one side in return for a promise on the other, does not, for the purpose of deciding whether a particular agreement is marked by consideration so as to constitute a contract, concern itself with the justice or reasonableness of the bargain. Each party is left free to bargain for what he is content to accept as a sufficient recompense for what he is giving. Whether what he so bargains for is a fit equivalent, either in respect of profit to himself or detriment to the other party, is a matter as to which the law, for the present purpose, is indifferent. The consideration, therefore, may be wholly inadequate to the value of the promise, but it will be a good consideration none the less, and the agreement a valid contract. And this is so even though the inadequacy is well known to the promisor, so that to the extent of this inadequacy the promise is intentionally gratuitous. A man may by way of gift to his son agree to sell him for £100 an estate which is worth £10,000, and this real though inadequate consideration will support the entire promise (g). And as we have seen (h), the payment or

(c) See also the dissenting judgment of Byles, J., in *Shadwell v. Shadwell* (1860), 9 C. B. (N.S.) 159, 176-7; 142 E. R. 62, 69; and Jackson, *History of Quasi-Contract*, 49-50.

(d) Byles, J., in *Westlake v. Adams* (1858), 5 C. B. (N.S.) 248, 265; 141 E. R. 99, 106.

(e) *Bolton v. Madden* (1873), L. R. 9 Q. B. 55, 57.

(f) See also *Haigh v. Brooks* (1839), 10 A. & E. 309; 113 E. R. 119; *Simons v. Long* (1849), 13 L. T. (O.S.) 74.

(g) Cf. *Thomas v. Thomas* (1842), 2 Q. B. 851; 114 E. R. 330.

(h) See p. 106, *ante*.

promise of a nominal sum of money for the express purpose of rendering the promise binding may be a sufficient consideration (i).

Illusory Consideration. Although, however, the detriment, present or contemplated, to the promisee is not to any extent required to be equivalent in value to the promise, it must nevertheless be real. That is, however small it may be, it must amount to a detriment in fact to the promisee and not subsist merely in words. It must not be illusory. Thus an agreement (not by deed) whereby A promised to pay B £1,000 on December 1 in consideration of a promise by B to pay A £100 at the same time would be regarded by the law as merely a gratuitous promise by A to pay B £900 (k). In *Kaye v. Dutton* (l) a conveyance, reserving a lien, by one who at no material time had any interest in the property beyond the lien was held to be an illusory consideration. Again, a consideration which consists in a promise is illusory and inoperative if it is itself for any reason devoid of contractual efficacy. Thus, in *Wyatt v. Kreglinger* (m) the consideration relied upon was a promise void in law as being an undue restraint of trade, and hence was illusory. Similarly a promise void for uncertainty would be an illusory consideration (n). But a promise which was merely unenforceable for non-compliance with the Statute of Frauds would nevertheless be a good consideration (o).

A consideration consisting in a promise is not illusory merely because it is subject to a condition, so that by possibility the party providing it may not have to render any performance of his promise at all. For example, the conditional promise of an insurer in a contract of fire insurance to indemnify the insured against loss by fire is a good consideration for the assured's promise to pay the premium, although if no fire should occur during the period of the insurance performance of the insurer's promise will not be required of him. In such cases the risk of detriment is itself a detriment.

PROMISE TO PERFORM A LEGAL OBLIGATION. The notion of illusory consideration has been very much discussed in relation to those cases where the doing or promising by one party of an act

(i) See also Street, *Foundations of Legal Liability*, vol. 2, 69—70. Inadequacy of consideration may, indeed, be important where equitable relief is sought. See pp 287, 600, 606—7, *post*.

(k) See Street, *Foundations of Legal Liability*, vol. 2, 69 note

(l) (1844), 7 Man. & G. 807; 135 E. R. 328.

(m) [1933] 1 K. B. 793.

(n) *Taylor v. Brewer* (1813), 1 M. & S. 290; 105 E. R. 108; *Roberts v Smith* (1859), 4 H. & N. 315; 157 E. R. 861.

(o) *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735; 132 E. R. 283.

which he is already bound to do by virtue of a legal obligation or duty already imposed on him independently of the alleged contract is relied upon as consideration. What detriment is involved in such a performance or the promise of it? Doubtless a man may make for good consideration a binding promise to do an act which he is already legally bound to do. A contractual obligation may in this manner be superimposed upon a non-contractual obligation with the same contents. A surgeon may promise to use due skill and care in performing an operation so as not to cause needless injury to his patient; this is a good contract notwithstanding that he would have been equally bound to use such skill and care if there had been no contract at all, as, for example, if he had been operating on a child: So Peter may borrow Stephen's motor car and promise not to damage it by ill-treatment, and to allow Peter to resume possession of it on demand, but he would have been equally so bound even if there had been no contract, as if he had taken the car without authority. In all such cases the person injured has the benefit of two concurrent obligations, one of them *ex contractu* and the other *ex delicto*, and he has two alternative causes of action accordingly (p). The question which we have here to consider, however, is not whether a promise to perform a pre-existing legal duty can be binding as a contract, but whether the promise to perform or the performance of a pre-existing legal duty can be a good consideration for the promise of another person. In other words, can a man purchase a promise by doing or promising to do nothing more than what he is already legally bound to do?

In answering this question it is needful for the purpose of discussion to distinguish between a pre-existent legal duty owing to the other party to the contract and one which is owing to some third person. As to the first of these cases, it is established by authority that one person cannot by any promise or performance which does not go beyond the limits of his pre-existing legal duty to another person provide a good consideration for a promise by that other person in his favour. In contemplation of law it is no detriment to a party merely to perform and no promise of a detriment merely to promise to perform what is already his legal duty to the other party to the alleged contract. Such a consideration is merely illusory and inoperative. Thus no action will lie on bargains constituted by acceptances of such offers as the following: "If you pay the debt which you now owe me on the due date, I will allow you

(p) See Salmond, Torts (10th ed.), 8-9.

a discount of 5 per cent.” “If you promise to refrain from publishing this libel against me, I will pay you £100.” “If you promise to give me possession next month of my property which you now detain from me without right, I will allow you to keep and use it in the meantime” (q).

COMPROMISE OF DISPUTE. The case is otherwise, however, if there is a genuine dispute as to the existence of the pre-existing duty or obligation. In such a case the actual or promised performance of the disputed duty or obligation is a real and not merely an illusory consideration. It amounts to the voluntary abandonment of a *bona fide* claim or contention that the duty or obligation does not exist. The promisor obtains a genuine advantage accordingly, and is therefore bound by his own promise as made for good consideration. A contract so made by way of the settlement or compromise of disputed claims of right is binding accordingly as based on a real consideration, even though in truth the disputed duty or obligation really existed. Conversely, the abandonment of a *bona fide* claim of right is a good consideration sufficient to support a promise by the other party, even though the claim was in truth unfounded. “It seems to me”, said Bowen, L.J., in *Miles v. New Zealand Alford Estate Co.* (r), “that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law

(q) *Foakes v. Beer* (1884), 9 App. Cas. 605; *Mallalieu v. Hodgson* (1851), 16 Q. B. 689, 117 E. R. 1045; *Vanbergen v. St. Edmunds Properties, Ltd.*, [1933] 2 K. B. 223; *Swain v. West (Butchers), Ltd.*, [1936] 3 A. E. R. 261. If the question had been free from authority the reasoning employed at p. 120, *post*, to sustain the performance of a pre-existing duty or the promise thereof by the debtor, as a sufficient consideration between the debtor and a third party, might also have been invoked as between the debtor and the creditor, at any rate so far as concerns the case where the creditor gave his promise in consideration of the debtor's actual performance of the pre-existing obligation. If it is a detriment to the debtor, when contracting with a third party, to forgo, by paying the creditor, the opportunity of bargaining with the creditor for a release or further time, or of failing to perform and submitting to the consequences, the case would not in this respect seem different where it was the creditor, and not a third party, with whom the debtor was contracting. In view of the decisions, however, this approach to the question as between the debtor and the creditor is not open.

(r) (1886), 32 Ch. D. 266, 291.

as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." There would be no consideration, however, if the person making the claim knew it to be unfounded (s).

PROMISE TO PERFORM OBLIGATION TO STRANGER. When the pre-existing obligation is owed not to the other party to the contract, but to a stranger, the question is one of much greater difficulty. It involves, to borrow the words of a great American Judge (t), "a vexed problem of law which has been debated by Courts and writers with much subtlety of reasoning and little harmony of results". It is, however, rather of theoretical interest than practical importance. It may be thus formulated: "If A purports to purchase a promise from C merely by performing or promising to perform his legal duty to B, is C's promise founded on good consideration or is it merely *nudum pactum*?" It is clear that this question is not in essence the same as that which relates to a pre-existing obligation between the parties themselves. In the case of a duty owing to a third person, one party to the contract may have a real interest in obtaining a promise from the other party to perform that duty, and therefore may obtain a real benefit from a consideration which consists in such a promise. By obtaining such a promise, he obtains, if it is legally binding, what he did not possess before—namely, a personal right to insist on the performance of that duty and to recover damages for the breach of it. Or the party interested in the performance by the other of a duty owing to a third person may prefer to secure that performance by offering a promise conditional on acceptance not by the making by the other of a counter-promise, but by the actual performance by him of his duty to the third person. The interested party has thereby obtained from the other an advantage which he might otherwise not have obtained, for the other party, but for the new agreement, might have preferred not to perform the duty but to pay damages, or at any rate to secure the benefit of such delay as legal proceedings for specific performance would involve. As Wilde, B., said in *Scotson v. Pegg* (u), "In this case the defendant was a stranger to the original contract and had no remedy for breach of it, yet he

(s) *Callisher v. Bischoffsheim* (1870), L. R. 5 Q. B. 119; *Wade v. Simeon* (1846), 2 C. B. 518; 135 E. R. 1061. Generally, see Holdsworth, *History of English Law*, vol. 8, 18—19; Ames, *Lectures on Legal History*, 325—327.

(t) Cardozo, J., in *De Cicco v. Schweizer* (1917), 221 N. Y. 431.

(u) According to the *Law Times* report: (1861) 3 L. T. 753, 754; cf. 6 H. & N. 295, 301; 158 E. R. 121, 123.

induced the plaintiff to do that which he might not have chosen to do, but might have said: 'I will break my contract, and leave the other party to his remedy' " (x).

This, however, is to look at the matter from the viewpoint of benefit to the promisor, whereas what is necessary is detriment to the promisee. If C gives a promise to A in consideration of A's performing or promising to perform A's already existing duty to B, where is the present or contemplated detriment to A? Suppose that A actually performs his pre-existing duty to B. It has, indeed, been argued that this, so far from being a detriment to A, is an advantage to him, for it discharges him of an existing obligation (y). But this is an unduly restricted analysis. Until A performs the

(a) *Abbott v. Doane* (1895), 163 Mass. 433, a decision of the Supreme Judicial Court of Massachusetts much cited in discussions on the present question, illustrates the above remarks very well. In that case the plaintiff had given his accommodation note to a corporation, which had discounted it at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, but when the defendant was sued on his note he contended that it was without consideration, because the plaintiff was already bound in law to take up the note with the bank. The Court, however, rejected this argument, and in the course of its judgment said: "It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperilled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so . . . it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration when he has had all the benefit that he expected to get from it."

Take an illustration. A enters into a contract with B to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B, but rather for the benefit of others; as, e.g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B may be executed or executory; it may be money, or anything else in law deemed valuable, it may be of slight value as compared with what A has contracted to do. Now A is legally bound only to B, and if he breaks his contract nobody but B can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A is legally bound, the motive to perform the contract may be slight. If after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A, by which A agrees to do that which he was already bound by his contract with B to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They had got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do".

(y) Pollock, *Contract* (11th ed.), 150.

as being a detriment to the promisee, so equally must a promise of such performance be, for it is a promise of such a detriment and not merely of that which is unreal and illusory.

This conclusion does not merely rest on principle, however. There is authority both ancient and modern to support the validity of A's performance or promise of performance of an already existing duty owing to B as a consideration for a promise given by C.

CASES ON PROMISES TO PERFORM OBLIGATIONS TO A STRANGER. The earliest case is *Bagge v. Slade* (c). In that case, a bond executed by a principal and by A and B as sureties being forfeited, B requested A to pay the whole debt to the obligee and promised to repay him a moiety. A paid accordingly and brought *assumpsit* against B for refusing to keep his promise. It was objected that there was no consideration for the promise, since A was already bound to the obligee for the full amount of the bond. But the Court gave judgment for A. Coke, C.J., said, "I have never seen it otherwise but when one draws money from another, that this should be a good consideration to raise a promise" (d) (e).

In *Shadwell v. Shadwell* (f) the plaintiff became engaged to marry a Miss Nicholl. His uncle subsequently wrote to him in the following terms: "I am glad to hear of your intended marriage with Ellen Nicholl and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require". At the uncle's death the payments were in arrears, and the plaintiff accordingly brought an action against the uncle's personal representatives. The point was very clearly taken in the pleadings and in argument that the consideration of the plaintiff's marriage should be regarded as illusory. The Court (Erle, C.J., and Keating, J., Byles, J., dissenting), however, in a judgment delivered by Erle, C.J., held that the consideration was good, finding it sufficient

(c) (1616), 3 Bulst. 162; 81 E. R. 137.

(d) As Ames pointed out (Lectures on Legal History, 327), in considering this case it should be remembered that in the absence of an express contract there was at this time no right of contribution for a surety either at law or in equity.

(e) So also *Moore v. Bray* (1633), 1 Vin. Abr. 310, pl. 31; and an anonymous case of 1631, cited by Ames (*loc cit.*) as being thus reported in Sheppard's Action on the Case (2nd ed., 155-156): "If A owe to B twenty pounds and C say to A pay him his twenty pounds and I will pay it to you again, this is a good consideration and promise Adjudged." *Contra. Westbie v. Cockayne* (1631), 1 Vin. Abr. 312, pl. 36.

(f) (1860), 9 C. B. (N.S.) 159; 142 E. R. 62.

however, in many cases of this kind the contract would be held void not for want of good consideration, but as illegal or opposed to public policy. It can hardly be supposed that the law would recognise and enforce a contract in which the consideration was nothing more than a promise not to commit a criminal offence, or nothing more than the act of refraining from such an offence. A contract that if A will not assault or libel B, C will pay A £100, is presumably invalid as contrary to public policy. To enforce such contracts would enable persons to bargain for remuneration for not violating the law, or to extract money by threats to do so (*k*). And somewhat similar to these are cases where the duty of which performance or the promise of performance is relied upon as consideration is a duty of a public nature (*l*), as, *e.g.*, the duty of a soldier to serve with his unit as required by military law (*m*) (*n*).

Past Consideration is no Consideration. It inevitably follows from the implication of consideration with agreement that consideration, while it may be executed or executory, cannot be past (*o*). Consideration, as we have seen (*p*), is either the acceptance of an offer or else that which, being offered, is accepted. If it is the acceptance of an offer it may be an act, or act in the law, or it may be a promise. That is, it may be executed or it may be executory. But it clearly cannot be past, for an offer cannot be accepted by conduct, whether promise, act or act in the law, which took place before the offer was made.

If the consideration is what was offered and accepted it cannot even be executed unless it is an act in the law; except in this case it must be executory, *i.e.*, a promise. I may offer a promise conditionally on the offeree accepting it by subsequently giving a promise in return; but I cannot do an act conditionally on a promise being subsequently provided for which that act will be a consideration. To take an example. Without your concurrence I clean your shoes. That is an act. Then I go to you and say, "I have cleaned your

(*k*) Such cases as the following illustrate the principle: *Randal and Harvey's Case* (1623), Godb. 358; 78 E. R. 211; *King v. Hobbs* (1603), Yelv. 26; 80 E. R. 19; *Atkinson v. Settree* (1744), Willes 482; 125 E. R. 1279; *Herring v. Dorell* (1840), 8 Dowl. 604.

(*l*) *Collins v. Godefroy* (1831), 1 B. & Ad. 950; 109 E. R. 1040.

(*m*) *Sanderson v. Workington B. C.* (1918), 34 T. L. R. 386.

(*n*) On the general question discussed above see the careful survey of the authorities and literature by A. G. Davis, *Promises to Perform an Existing Duty*, 6 Cambridge L. J. 202.

(*o*) Cf. Holmes, *Common Law*, 295.

(*p*) See pp. 97 *et seq.*, *ante*.

shoes. In consideration of that act will you pay me 1s.?" Is this even an offer, let alone an offer of what, if accepted, could be a consideration? As Pollock, C.B., remarked (q), "Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?" (r). In the case of the offer of an act in the law, however, the position is different. Upon acceptance by the offeree not only is the contract made, but the act in the law, which constitutes an executed consideration for the promise given by the offeree by way of acceptance, is at the same time accomplished. Thus A offers to sell B a specific book for 5s. Upon B accepting, the property in the book passes to him, and this assignment constitutes an executed consideration for B's promise to pay the price.

The principle that consideration may not be past is clearly illustrated by the well-known case of *Roscorla v. Thomas* (s). The defendant sold the plaintiff a horse and afterwards, in consideration of the sale, warranted that the horse was free of vice. The plaintiff having sued the defendant for breach of this warranty the defendant contended that the alleged consideration of the previous sale, being past at the time when the warranty was given, was no consideration; and this contention prevailed. The case, said Lord Denman, C.J., appeared to the Court "to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law".

(q) *Taylor v. Laird* (1856), 25 L. J. Ex. 329, 332.

(r) Cf. the recent decision of the Court of Appeal in *Harrods, Ltd. v. Geneen*, [1938] 4 A. E. R. 493. In this case Geneen instructed Harrods to find a tenant for certain premises who would pay rent in advance. Harrods proffered a tenant who was only willing to pay the rent in arrear. After some negotiation Geneen agreed to accept this tenant, but subsequently he changed his mind and declined to let the premises to her. Harrods then sued in respect of their commission, and a majority of the Court of Appeal held that they were entitled to succeed. The soundness of this conclusion seems open to doubt. At any rate some of the reasoning may, with respect, be thought not entirely satisfactory. All of the Lords Justices spoke of the original arrangement between Harrods and their client as a contract, and two of their Lordships said that it was based on mutual promises. It may be suggested, however, that there was in fact merely an offer by the client calling for acceptance by the provision of an executed consideration. Cf. *per* Lord Romer in *Luxor, Ltd. v. Cooper*, [1941] A. C. 108, 152-4. See p. 131, *post*. Afterwards, Harrods, in effect, requested their client to make a new offer, and the question was whether this new offer stipulated for an acceptance by the provision of an executed consideration, and if so whether such consideration was in fact provided by Harrods. There is much force in the dissenting judgment of MacKinnon, L.J., that no such consideration was provided.

(s) (1842), 3 Q. B. 234; 114 E. R. 496.

Consideration of a Precedent Moral Obligation. To the rule that in the law of contract past consideration is no consideration there are certain exceptions which may be grouped under the head of consideration of a precedent moral obligation to do the thing promised. In the seventeenth and eighteenth centuries we find respectable authority for the general proposition that a promise by a man to do what he is already bound to do, though by a merely moral obligation not legally enforceable, constitutes a valid and binding contract made in consideration of the precedent moral obligation, and prevented by the existence of that obligation and consideration from being a mere *nudum pactum*. Blackstone says (t): "Even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the Statute of Limitations) it is no longer *nudum pactum*". To the same effect is Lord Mansfield in *Hawkes v. Saunders* (u): "Where a man is under a moral obligation which no Court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a man after he comes of age promises to pay a meritorious debt contracted during his minority but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust or a trust void for want of writing by the Statute of Frauds". So in *Lee v. Muggeridge* (x) it is said: "Wherever there is a moral obligation to pay a debt or perform a duty, a promise to perform that duty or pay that debt, will be supported by the previous moral obligation".

No such general proposition, however, can now be maintained as authentic in the modern law of contract. In 1840 the question was considered by the Court of Queen's Bench in *Eastwood v. Kenyon* (y), and the general principle of moral obligation as a sufficient consideration for a promise to fulfil it was authoritatively cut down to a more precise and limited rule. Modern law recognises the consideration of a precedent moral obligation as sufficient only in specified classes of cases. The cases in question are those in which the subsisting moral obligation was formerly a legal obligation which has become in some manner unenforceable or inoperative, or in which the subsisting moral obligation would in the normal course

(t) Vol. 2, 445.

(u) (1782), 1 Cowp. 289, 290; 98 E. R. 1091.

(x) (1813), 5 Taunt. 36, 47; 128 E. R. 599, 603.

(y) (1840), 11 Ad. & El. 438; 113 E. R. 482

for them. In all probability, however, there is no such authentic rule, such a promise being inoperative unless the request was such as itself to constitute an implied promise to pay reasonable remuneration for the services so rendered, and the subsequent express promise operating merely as evidence of what the services were worth, or as an agreement determining the sum payable therefor (g).

Modifications of Rules as to Consideration in Regard to Bills and Notes. The rules as to consideration are subject to certain modifications in regard to bills of exchange (including cheques) and promissory notes. The law as to these is now codified in the Bills of Exchange Act, 1882. Before codification this law was a special and distinct part of the common law derived originally from the law merchant and different in divers respects from the ordinary common law.

With reference to consideration the Bills of Exchange Act provides as follows:—

“S. 27.—(1) Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract;

(b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien”.

“S. 30.—(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value”.

It will be noticed that the rules thus laid down in the Act differ from the ordinary rules in the following respects. (i) Past consideration is a sufficient consideration. (ii) Provided that consideration was given for a bill or note at some stage, a person may be liable on the instrument although not himself a party to that

(or any other) consideration. Thus A may draw a cheque in favour of B or order and make a gift of it to B. B may endorse it to C in payment of a debt, and C may give it to D. ~~B can sue A.~~ (iii) Consideration is presumed unless the contrary is shown. The ordinary rule is that a party suing on a simple contract must allege and prove consideration.

§. Revocable Nature of an Offer

Inasmuch as only declarations of will which are binding as contracts in the form of a deed, and those amounting to agreements made by consideration, it follows that an offer not by deed, though expressly declared to be irrevocable for a particular time, is completely revocable nevertheless. "It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But this can make no difference. The offer was not a contract, and the term that it should remain open for ten days was therefore not binding. It has often been held that such an offer may, notwithstanding, be withdrawn within the time limited" (h).

The impossibility of making, otherwise than by deed, an offer which shall be to any extent irrevocable has caused at least a theoretical difficulty where the offer stipulates for an executed consideration which is to take some time in performance. If after the offeree has partly performed the act stipulated for by the offeror the offeror revokes his offer, will this revocation be valid and effectual so that the offeree will have no remedy? The Law Revision Committee say (i), "A promises B fifty pounds if he walks from London to York in three days. A can withdraw his promise at any time before B has reached York". It is likewise often asserted that as, until completion by the offeree of performance of the act which is to constitute the acceptance, there is no contract, the offeree can at any time discontinue with impunity his performance of that act. For example, a merchant offers to pay a carrier ten pounds if he places a load of merchandise on board a steamer which is about to sail. The carrier takes the merchandise, but before reaching the docks, accepts another engagement and meanwhile deposits the merchant's goods in a safe place. In consequence of accepting the

(h) *Kay, J., Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616, 625; see also *Routledge v. Grant* (1828), 4 Bing. 653; 130 E. R. 920; *Dickinson v. Dodds* (1876), 2 Ch. D. 463; and *Offord v. Davies* (1862), 12 C. B. (N.S.) 748; 142 E. R. 1336.

(i) Report on Statute of Frauds and Consideration (Cmd. 5449), para. 39.

second engagement the carrier fails to have the goods loaded on the ship before she sails, and the merchant suffers damage. Nevertheless it is argued that he would have no remedy.

These results are said to follow from the nature of agreement. Until an offer has been accepted in the prescribed manner there is no agreement (*k*). If, therefore, the prescribed manner of acceptance is the complete performance of some act, then even if the performance has been commenced the offer will not have been accepted until performance is completed and hence until then will be revocable. And if, after revocation, the offeree proceeds to complete the performance stipulated for as an acceptance he will merely have attempted to accept a revoked offer. Sometimes what is essentially the same explanation is given in somewhat different terms. It is said that there can be no contract because the consideration stipulated for has not been supplied during the time when the offer was unrevoked (*l*).

There seems no logical answer to this reasoning. Attempts have indeed been made to overcome the difficulty by calling in aid some vague kind of equitable estoppel (*m*); or by implying a promise on the part of the offeror that he will not do anything to interfere with the promisee's performance of the required act, the consideration for the implied promise being the promisee's beginning the performance of the required act (*n*). These attempts, however, are not entirely satisfactory, as the Law Revision Committee pointed out.

In some cases, indeed, the offeree may be able to recover quasi-contractually in respect of so much of the performance as takes place before the revocation of the offer is communicated to him. Thus A may offer B £10 in return for B's transporting certain goods from London to Cambridge, the offer being so expressed as to call for acceptance by the provision of a fully executed consideration. If when B has transported the goods as far as Bishop's Stortford A revokes his offer, there seems to be no reason why B should not recover on a *quantum meruit* for what he has already done. But such a solution is not available in all cases. In particular it is not available where the terms of the offer expressly or impliedly exclude

(*k*) See p. 79, *ante*.

(*l*) See Ashley, Offers Calling for a Consideration other than a Counter Promise, 23 Harv. L. R. 159; McGovney, Irrevocable Offers, 27 H. L. R. 644. For a criticism of these views see Pollock, 28 L. Q. R. 100, and Principles of Contract (11th ed.), 19.

(*m*) 23 H. L. R. 168.

(*n*) 27 H. L. R. 658 ff.

it. Thus suppose that the owner of a house places it with a land agent for sale, thereby (in the absence of any special provision to the contrary) offering the agent a promise of commission if he accepts the offer by providing the executed consideration of introducing a party to whom the property shall be sold. In such a case the owner is ordinarily not in any way liable to the agent if before a sale has actually been effected he withdraws his instructions and revokes his offer; and this notwithstanding that the agent may have spent time and money in seeking for a purchaser and attempting to bring about a sale. This is so because the ordinary understanding of the parties in such a case is that the agent is not to receive any remuneration unless the owner actually sells the property to a purchaser introduced by the agent (o).

Whether or not any theoretically satisfying answer to the problem as a whole can be evolved, however, the matter does not seem to be of great practical importance and there is no English decision in which it is much considered. Doubtless the Courts would regard all but the most intractable offers as requiring not a complete performance by way of acceptance but a promise, signified by the commencement of performance, to complete the performance within a reasonable time. Thus in the course of the argument in *Offord v. Davies* (p), Williams, J., asked: "Suppose I guarantee the price of a carriage to be built for a third party, who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guarantee?" Counsel answered: "Not after the coach-builder has commenced my carriage." Thereupon Erle, C.J., remarked: "Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted."

§. 46. Offer Distinguished from Option

The difficulty created by the revocable character of an offer is in practice generally overcome by the parties giving and accepting an option in respect of the particular matter. An option is a contract or other act in the law containing a term by which one party (who may be called the optionholder) is empowered to elect within a specified time whether the contract or other act in the law shall

(o) *Luxor, Ltd. v. Cooper*, [1941] A. C. 108. See also *Davis v. George Trollope & Sons*, [1943] 1 A. E. R. 501.

(p) (1862), 12 C. B. (N.S.) 748, 753; 142 E. R. 1336, 1338.

operate further than by conferring the power of so electing it has already done. In other words an option is an act in the law which is conditional upon the optionholder electing that it shall become fully and (so far as regards the power of election) unconditionally operative between the parties. We are here concerned only with options which are conditional contracts, not with those which are conditional acts in the law of other descriptions, as, *e.g.*, assignments (*q*). To a conditional contract which is an option the form of a deed, or else consideration, is as necessary as to any other contract. It might at first sight be thought that if the contemplated performance should involve some act or promise on the part of the optionholder this would be sufficient as consideration. But this is not so. So long as the matter does not advance beyond the stage of an option the optionholder has in respect of the contemplated performance done nothing at all—neither performed an act nor given a promise. If the option is not by deed, therefore, the grantee of the option must give some consideration quite apart from anything which he may have to do should he exercise the option.

He who has obtained such an option has the benefit not of a mere revocable offer but of an irrevocable and binding, though conditional, contract (*r*). For example, A, the owner of Blackacre, may agree with B that in consideration of £1 paid by B, B shall be entitled to purchase Blackacre for £100 if within one month he notifies A of his election to do so. In such a case A has entered into a conditional contract with B to sell Blackacre to him and this contract ceases to be conditional and becomes absolute so soon as B fulfils the condition of exercising the option in the stipulated manner. The case is not one of a mere revocable offer; on the contrary the seller has received consideration (*viz.*, £1) for a promise

(*q*) As an example of an option which is a conditional assignment may be taken the following. A agrees with B that, in consideration of 1s. paid by B, B shall be entitled to become the owner of a specific chattel if within one month he elects to do so by paying A £5. Here the grant of the option amounts to a conditional assignment of the chattel and the exercise of the option by payment of the £5 within the month will constitute the fulfilment of the condition and render the assignment absolute.

(*r*) So in *Weeding v. Weeding* (1861), 1 J. & H. 424, 430; 70 E. R. 812, 815, Page Wood, V.-C., speaking of an option to a lessee to purchase the demised premises said, "It is as much a conditional contract as if it depended on any other contingency than the exercise of an option by a third party, such as, for example, the failure of issue of a particular person". See also, Halsbury, *Laws of England* (2nd ed.), vol. 31, pp. 336-7. An option to purchase goods, however, is not such a conditional contract of sale as is within s. 25 (2), *Sale of Goods Act*, 1893, and the optionholder is not one "having agreed to buy" within the meaning of that provision. *Marten v. Whale*, [1917] 2 K. B. 480.

to sell; and the promise, which would otherwise have been honorary merely, has thereby become a contract.

It may, indeed, be suggested that, although such an option arises from and is conferred by way of contract, the terms specified in it as those which the optionholder may elect to accept are not themselves, before acceptance, an existing contract or part of such a contract but are merely the terms of a contract not yet existing but which the grantor of the option contracts with the grantee to make with him on his request within the specified time. In other words, it may be suggested that an option is merely an offer and therefore revocable like any other offer, but that the offeror has entered into a collateral contract for good consideration not to revoke his offer, and will therefore be liable in damages if he wrongfully revokes it. If this were so, however, the revocation of an option would be legally effective to prevent the subsequent acceptance of it from constituting a contract, the remedy of the optionholder being merely an action for damages for being so deprived of his opportunity of entering into the contract specified in the option. But this is not the true interpretation or effect of the grant of an option. The consideration given by the optionholder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively (s). Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become *ipso jure* an absolute contract by the fulfilment of the condition (t). The true formula of the grant of an option (for the sake of simplicity taking only the case of an option

(s) Accordingly it has been said that a valid option to purchase land, even before it has been exercised, creates an equitable interest in the land. *London and South Western Ry. v. Gomm* (1882), 20 Ch. D. 562. That case concerned an option to repurchase land contained in a deed of conveyance, and Jessel, M.R., thus stated the effect of such an option (p. 581): "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land". See also *Brough v. Nettleton*, [1921] 2 Ch. 25, where P. O. Lawrence, J., said (p. 29), in reference to an option to purchase contained in an agreement for a lease: "Although the defendant's obligation to sell the house did not become operative unless and until the plaintiff gave his notice to exercise his option, nevertheless such obligation was imposed upon the defendant by the agreement of August, 1917 [i.e., the agreement for the lease and the option], and by none other".

(t) See *Morland v. Hales* (1910), 30 N. Z. L. R. 201.

by way of simple contract) is not: "I promise for good consideration hereafter to enter into such and such a contract with you if within a certain time you demand that I do so". The true formula is, on the contrary: "I here and now for good consideration contract with you on such and such terms, subject to the condition that within a certain time you give me notice that you intend to demand fulfilment of my contract".

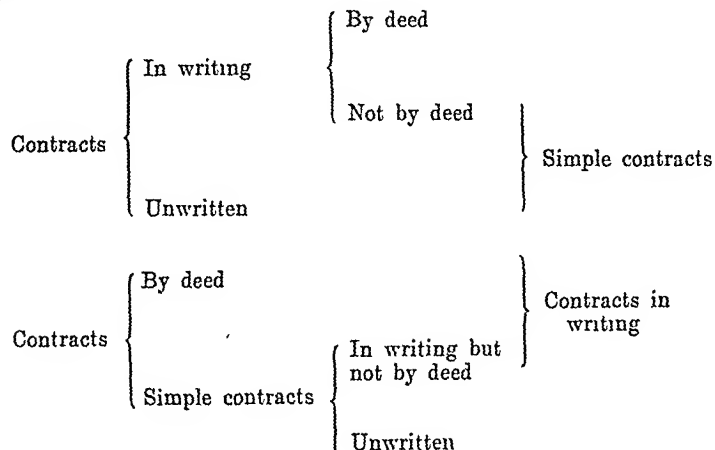
§ 47. Classification of Contracts According to Manner in which they are Made or Evidenced

(1) Contracts by deed.

(2) Written contracts not by deed—namely, those which are expressed in the form of an instrument which is not a deed.

(3) Unwritten contracts—namely, those which are made by word of mouth or tacitly by the conduct of the parties, without expression in a written instrument.

Contracts of the first and second kinds are classed together, and opposed to contracts of the third kind, under the generic designation of written contracts or contracts in writing. Contracts of the second and third kinds are classed together, and opposed to contracts of the first kind, under the generic designation of *simple* contracts. For some purposes one of these modes of division and classification is material and appropriate, and for other purposes the other. The two alternative schemes may be exhibited as follows:—



A simple contract—that is to say, any contract which is not by deed, whether it is in writing or not—is sometimes called, in accordance with the older usage of the law, a *parol* contract—a contract made in words (*paroles*). This usage dates from a time when the only writings recognised by the common law as possessing any legal effect as operative instruments were deeds. Writings not being deeds were of no greater or different force or effect than spoken words. And when contracts otherwise than by deed came to be generally recognised and enforced by the law no greater efficacy was attributed to those in writing than to those in spoken words. Hence the term *parol* contract was used to include not only contracts which were made by spoken words, but also those which were made by instruments in writing, provided that those instruments did not amount to deeds (a). The historical reason for this extended use of the term *parol* has ceased to operate in modern law, and in the interests of scientific nomenclature the usage should be discontinued accordingly (b). Contracts not by deed, whether written or unwritten, should be distinguished as *simple* contracts (c).

By another usage, similarly arising from an earlier stage in the development of the common law, a deed is sometimes called a *specialty*, and contracts under seal are called *specialty contracts* accordingly, and are distinguished by this title from simple contracts. In the beginnings of the legal system *specialis conventio* meant a special agreement superseding or derogating from the common law in its application between the parties, and determining the rights of the parties *inter se* in some manner different from that which would have been adopted by the common law itself unaffected by agreement. It was *specialis conventio contra jus commune*, operating in conformity with the maxim *modus et conventio vincunt legem* to exclude or modify the common law in the particular instance, just as local custom or a special statute did. But the only agreement that was recognised by early law as capable of

(a) *Per* Skynner, C B, delivering the opinion of the Judges before the House of Lords in *Rann v Hughes* (1778), 7 T. R. 350 n. (a); 101 E. R. 1014: quoted, p. 97, *ante*.

(b) Cf. Stroud, *Judicial Dictionary Supplement*, *sub nom.* Parol: "Probably it may be said that when we now speak of anything being done 'by parol'—e.g., the making of a contract, or the giving of evidence—we, generally, mean, doing it orally, i.e., by word of mouth only."

(c) Cf. 2 Bl. Com. 465, 466: "Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise".

any such operation was an agreement under seal. It was not, indeed, until the sixteenth century that the law consented to recognise in any general way the binding force of agreements made otherwise than by deed. Hence in early law the only operative *specialis conventio* was a deed; and so it has come about that the term specialty contract is used to mean a contract by deed, as opposed to a simple contract by word of mouth or by unsealed instrument. The term, however, is no longer fit for acceptance in a system of scientific legal nomenclature, being founded on obsolete historical considerations. It is better to speak merely of contracts by deed, as opposed to simple contracts. Some writers have suggested the use of the term *formal* contract for this purpose. But a deed is not necessarily in any respect more formal than a written instrument to the same effect executed under the hands of the parties.

§ 48. Instruments and Documents

A written contract must be distinguished from an unwritten contract which is proved by evidence in writing. A written contract is one which is *made* in writing, not one which is made by word of mouth and proved by documentary evidence. It often happens that the existence or terms of an unwritten contract can be proved by subsequent documents written by one or both of the parties thereto and admitting or recognising that contract. But the contract does not for that reason become a written contract. It remains what it was in its origin—namely, an unwritten contract. A written contract is one which in its origin is constituted by the acceptance and recognition by the party or parties whose will it is of a certain document or set of documents as containing the authentic expression of the terms of the contract then made by him or them. The formula of a written contract is: “I hereby declare my will in accordance with, *or*, we hereby agree together on, the terms expressed in this document”. The document, that is to say, must be the original and authentic expression of the terms of the contract. It is not enough that it should be a subsequent admission or recognition of the terms of a contract originally and authentically expressed in spoken words (*d*).

(*d*) Thayer, Preliminary Treatise on Evidence, 393; Phipson, Evidence (7th ed.), 552; *Burce v. Bletchley* (1821), 6 Madd. 17; 56 E. R. 995; *Allen v. Pink* (1838), 4 M. & W. 140; 150 E. R. 1376; *Malpas v. L. & S. W. Ry* (1866), L. R. 1 C. P. 336; *Roe v. Naylor* (No. 2) (1919), 87 L. J. K. B. 958; *L'Estrange v. Graucob*, [1934] 2 K. B. 394. See also *Earl of Falmouth v. Roberts* (1842), 9 M. & W. 469, *per* Parke, B., 471; 152 E. R. 198, 199—200; and *Davidson v. Cooper* (1843), 11 M. & W. 778, 800; 152 E. R. 1018, 1027.

A document by which a contract is thus constituted is distinguished from one whose operation is evidential merely, as being not merely a document but an *instrument*. A deed, for example, or a formal memorandum of agreement executed by the parties, is not a mere evidential document; it is an operative contractual instrument. It does not merely prove the contract, but creates it. When, on the other hand, a verbal contract is followed by correspondence between the parties containing admissions of the existence of the contract or of its terms, those letters are merely evidential documents, *capable of use in proving the prior verbal contract*, but they are not operative contractual instruments creating a contract in writing. The distinction is one of considerable practical importance, inasmuch as written contracts created by operative instruments are governed by special rules of law which have no application to verbal contracts, even though they are capable of proof by evidential documents.

The distinction which we have indicated is not inconsistent with the fact that an unwritten contract is often superseded by and merged in a subsequent written contract to the same effect. It frequently happens that parties, after entering into a binding unwritten contract, thereafter for the sake of greater security and certainty transform it into a contract in writing. That is to say, they enter into a second and subsequent contract to the like effect constituted by an operative instrument, with the intent that the prior unwritten contract shall be wholly cancelled and superseded in favour of the written contract which has been substituted for it. The subsequent writing in such a case is not merely an evidential document for use in proof of a prior and subsisting unwritten contract; it is itself an operative contractual instrument constituting the authentic and final expression of the new and substituted contract thereby entered into (e). It makes no difference in this respect whether the parties, when they entered into the prior verbal contract, intended or did not intend that any such substituted written contract should be entered into. Where, however, a subsequent written contract was so intended, it is sometimes a question of some difficulty whether the prior unwritten arrangement was intended to constitute in itself a binding unwritten contract, or was intended, on the contrary, to have no binding force until and unless by mutual consent the parties subsequently entered into a written contract in pursuance thereof. The same difficulty may arise when

(e) *Leduc v. Ward* (1888), 20 Q. B. D. 475, 479—480.

a prior informal written agreement is followed by a subsequent formal written contract (f).

A contract in writing, then, is one the terms of which are set out in a contractual instrument; and such an instrument is a document which is accepted by the party or parties, in the act of making the contract, as containing the authentic expression of its terms.

§ 49. Execution

In its ordinary and typical form the acceptance of recognition which thus transforms a document into an instrument consists in the *execution* of that document by the parties to the contract. By execution is meant the act of the parties in adding to the document some visible sign or symbol of their acceptance of it as the authentic expression of their contract. Such execution is of two kinds, for it may either consist of sealing, generally accompanied by signing or other formalities, or it may consist of signing alone.

We have already noticed how an instrument is sealed (g). What amounts to a sufficient execution of an instrument by way of signature is a question of law dependent upon the nature of the instrument and admitting of different answers in respect of different classes of instruments. What may be a good signature of a contract for the sale of land is not necessarily a good signature of a will. It is sufficient, therefore, to say here generally that signature is of two kinds, one of which consists in the act of adding to the instrument the name or some abbreviation of the name of the executing party, while the other consists in the act of adding thereto the symbol which is popularly called his *mark*, and which represents the sign of the Cross, and symbolises the act of pledging his faith as a Christian to the due observance of his undertaking (h).

Execution is legally necessary for the validity of the instrument in the case of deeds (i), and also in the case of any other instrument for which execution is required by statute, as, for example, in the case of wills (k). Where a statute requires an instrument but does not expressly provide that it shall be signed, it is a question of con-

(f) See, e.g., *Rossiter v. Miller* (1878), 3 App. Cas. 1124, *per* Lord Blackburn; 1152; *Lewis v. Brass* (1877), 3 Q. B. D. 667; and p. 199, *post*.

(g) See p. 62, *ante*.

(h) Stroud, *Judicial Dictionary* (2nd ed.), *sub nom.* Signed: Signature. See also the definitions of *sign* and *signature* quoted p. 178, *post*, from the *New English Dictionary* (Oxford).

(i) Note, however, that where a deed contains a covenant by a person upon whom it also confers a benefit, that person, if he accepts the benefit, will be bound by the covenant even though he has not executed the deed. See p. 383, *post*.

(k) Wills Act, 1837, s. 9.

struction whether it must be signed by the party or parties. *Prima facie*, however, the expression "written instrument" in a statute means an executed instrument (1).

In cases where execution is not called for by any peremptory rule of law the acceptance by the party or parties of a written document as containing the authentic expression of the contractual terms may be effected otherwise than by the execution of the document. All that is required in such a case is that the party or parties shall by words or conduct sufficiently manifest an intention of adopting the document for this purpose. And the instrument may be executed by one of the parties, and accepted by the other without execution by himself. The typical and perfect form of a written contract is a formal memorandum of agreement signed by both parties. But this is not necessary. One party may write a letter to the other making a certain offer, and the other may write a letter in reply accepting the offer but not restating its terms. The result is a contract in writing, but the only document which contains the terms of it has been executed by the offeror alone. In this case the acceptor's signed letter may be regarded as incorporating the terms contained in the letter to which he replies. What shall be said, however, if the acceptance of the written offer is oral merely? Is this a contract in writing? Clearly it is so. All of the terms are contained in the letter of offer, and this letter has been transformed into an operative instrument by the acceptance of it for that purpose by both parties. The instrument has been executed by one party only, but it has been accepted as the authentic expression of the terms of the contract by both of them. What shall be said, then, if neither party has executed the instrument, as when A and B meet together, and A hands to B an unsigned paper containing the terms of his offer, and B orally accepts the offer as contained in that paper? Such an offer and acceptance constitute a good contract, and the contract is not unwritten but in writing, for the original and authentic expression of its terms is to be found in the written instrument acknowledged and accepted by both parties with that intent. A written contract does not mean one the making of which is proved by documentary evidence, but one the terms of which are expressed in writing in the very act of making it. Thus, if an intending passenger obtains from a steamship company a ticket entitling him to travel by one of the

(1) Cf. *Morton v. Copeland* (1855), 16 C. B. 517, especially *per* Maule, J., 534-5; 139 E. R. 861, 868-9.

company's steamers on a certain voyage, and containing the printed terms and conditions of the contract, this is a contract in writing, although the ticket has not been signed or otherwise executed by either party. Such a ticket, although unexecuted, is not a mere evidential document, but is an operative contractual instrument, subject to the rules of law which govern written as opposed to unwritten contracts (*m*).

§ 50. Execution of Instruments by Corporations Aggregate

It is a general rule of the common law in regard to corporations aggregate that, to be legally effective, any expression of the corporate will must be under seal. "For a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation: it is the fixing the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole" (*n*).

As a special application of this general rule the contracts of a corporation aggregate are *prima facie* required to be under the corporation's seal. "The general rule of law is that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will or do any act" (*o*).

To the rule that a corporation aggregate may contract only under seal extensive exceptions now exist. Of these some have been developed by the common law itself, one originated in equity, and others have been established by statute. All but one of the non-statutory exceptions apply to corporations aggregate in general; the remaining one applies only to trading corporations. The statutory exceptions are not susceptible of the same classification. It will be convenient, therefore, to consider (1) the non-statutory exceptions applying generally; (2) the non-statutory exception applying only to trading corporations; and (3) the statutory exceptions.

(*m*) *Parker v. South Eastern Ry.* (1877), 2 C. P. D. 416, 421; *L'Estrange v. Graucob*, [1934] 2 K. B. 394, 403.

(*n*) 1 Bl. Com. 476; *Haddock's Case* (1681), 1 Ventr. 355; 86 E. R. 229; *The Mayor of Thetford's Case* (1703), 1 Salk. 192; 91 E. R. 173; Holdsworth, *History of English Law*, vol. iii, 489 and ix, 54.

(*o*) Lord Denman, C.J., delivering the judgment of the Queen's Bench in *Church v. The Imperial Gas Light and Coke Co.* (1838), 6 A. & E. 846, 861; 112 E. R. 324, 330; *Corporation of Ludlow v. Charlton* (1840), 6 M. & W. 815; 151 E. R. 642.

(1) *Non-Statutory Exceptions of General Application*

(a) *Corporation Acting by Attorney.* The corporation may by instrument executed as required by the common law or by any relevant statute appoint an attorney who, if duly empowered so to do, may perform acts in the law in the corporation's name without the necessity of sealing, unless that arises by reason of the nature of the act itself (*p*).

(b) *Contract Dealing with Trivial, Frequently Occurring or Urgent Matters.* Where the contract deals with merely trivial matters, such as the appointment of an inferior servant (*q*), or with matters of frequent occurrence (*r*) or of urgency (*s*), then, on the ground of practical necessity (*t*) it will be good even though not under the corporation's seal.

(c) *Contract Performed in Favour of Corporation.* Where a corporation contracts for services or goods which are of a kind necessary for giving effect to the purposes for which it is created, and the whole of those services or goods or such part thereof as the corporation is willing to accept is duly rendered or delivered to the corporation, the corporation is liable to pay for what it has thus accepted notwithstanding that the contract was unsealed. This liability appears not to rest upon the express contract but to be quasi-contractual, of the nature of a *quantum meruit* or *valebat*. The other party would not therefore be necessarily entitled to the consideration promised by the corporation but only to the reasonable value of the services or goods (*u*).

(d) *Contract Performed by the Corporation.* It appears that where the contract has been performed on the part of the corporation, the corporation can sue the other party. It might, indeed, have been expected that this exception would be based upon and limited by the principles as to quasi-contract; but it is clear from the authorities that the corporation's remedy is an action upon an express simple contract. That is, the corporation is entitled

(p) See p. 14, *ante*; see also *per* Pollock, B., in *Mayor of Kidderminster v. Hardwick* (1873), L. R. 9 Ex. 13, 24.

(q) Thus the appointment of a butler need not be under seal: *Horne v. Ivy* (1670), 1 Mod Rep. 18; 86 E. R. 697; but the appointment of a medical officer must be: *Dyte v. St. Pancras Board of Guardians* (1872), 27 L. T. 342.

(r) *Wells v. Kingston-upon-Hull* (1875), L. R. 10 C. P. 402, 410, 411.

(s) *Ib.*

(t) *Church v. Imperial, etc., Co.* (1838), 6 A. & E. 846, 861; 112 E. R. 324, 330; *Lawford v. Billericay R. D. C.*, [1903] 1 K. B. 772, 781.

(u) *Lawford v. Billericay R. D. C.*, *cit. sup.*; see *per* Vaughan Williams, L.J., 780—784; and *per* Mathew, L.J., 786; see also *per* Greer, L.J., in *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K. B. 403, 409 ff.

to claim not merely the reasonable value of its performance, but whatever was promised by the other party (*x*). The recognition of this exception by the common law in effect reduces the rule requiring that a corporation aggregate should contract under seal to a rule that sealing is necessary only for the purpose of binding the corporation.

(*e*) *Part-performance*. The equitable doctrine of part performance, chiefly developed in regard to contracts under the Statute of Frauds (*y*), has been extended to cases where a corporation is relying on the absence of a seal as a defence to a suit for specific performance by a plaintiff who has partly performed his side of the contract (*z*). The doctrine in its application to corporations is subject to the same limitations as attach to it in regard to contracts under the Statute of Frauds. In particular it is available only where the contract, if it had been properly executed, would have been such that specific performance (*a*) or specific relief by way of injunction (*b*) could have been decreed (*c*).

(2) *Non-Statutory Exception Applying to Trading Corporations*

The contracts of a corporation created for trading purposes, if those contracts relate to the carrying on of the corporation's trade, are outside the common law requirement of a seal. This was finally settled by the decision of the Exchequer Chamber in *South of Ireland Colliery Co. v. Waddle* (*d*). "We are asked", said Cockburn, C.J., "to overrule a long series of decisions in all the Courts, which, in accordance with sound sense, have held that the old rule as to corporations contracting only under seal does not apply to corporations or companies constituted for the purpose

(*x*) *Fishmongers' Co. v. Robertson* (1843), 5 M. & G. 131; 134 E. R. 510. This was an action of special *assumpsit* for breach of an express promise to pay money. Tindal, C.J., (pp. 194—5, E. R. 535), makes it clear that the action was not based on *indebitatus assumpsit*. The case of *The Australian R. M. S. N. Co. v. Marzetti* (1855), 11 Ex. 228; 156 E. R. 814, was likewise an action of special *assumpsit*, being a claim for damages for breach of warranty in respect of goods sold and delivered.

(*y*) See p. 185, *post*.

(*z*) *Wilson v. West Hartlepool Ry.* (1865), 2 De G. J. & S. 475; 46 E. R. 459; *Steevens's Hospital* (1863), 15 Ir. Ch. R. 405.

(*a*) *Crampton v. Varna Ry.* (1872), L. R. 7 Ch. 562.

(*b*) See *Melbourne Banking Corporation v. Brougham* (1878-9), 4 App. Cas. 156, 169; cf. pp. 189, 190, *post*.

(*c*) Generally as to this exception see Fry, *Specific Performance* (6th ed.), pp. 306-7.

(*d*) (1869), L. R. 4 C. P. 617, affirming the Court of Common Pleas, L. R. 3 C. P. 463.

of trading, and we are invited to re-introduce a relic of barbarous antiquity." This invitation the Court declined to accept.

It would seem in accordance with principle that a corporation which was not primarily a trading corporation but had power to carry on a particular trade as incidental to its general non-trading activities should in regard to its trading activities have the same freedom as a trading corporation to contract otherwise than under seal. Thus where a municipal corporation had statutory powers to supply electricity it was held that contracts relating to this might be made without the use of the seal (*e*).

This exception as to trading corporations appears to have been developed out of the general exceptions as to trivial matters and matters of frequent occurrence, helped by the notion of necessity (*f*). The rule as to trading corporations is now, however, an independent exception and does not in any way turn on the importance of the subject-matter of the contract or the frequency of such contracts (*g*).

(3) Statutory Exceptions

Exceptions to the common law requirement of a seal have been introduced in respect of particular kinds of corporations aggregate by statute (*h*). Statutes dealing with the execution of instruments by corporations aggregate are of two kinds: those which are merely permissive, simply providing non-mandatory alternative methods for the execution of contracts by the corporation; and those which mandatorily require sealing or other formalities. An example of a provision of the first kind is afforded by section 97 of the Companies Clauses Consolidation Act, 1845, under which a contract which by common law must be under seal may be made by the directors or a committee of them under the seal of the company; a contract by writing not required by the common law to be under seal may be by the directors or a committee of them under the hands of two directors, and a contract good at common law if made by parol may be made by parol by the directors or a committee of them. As an illustration of the second or manda-

(*e*) *Bourne & Hollingsworth v St Marylebone Borough Council* (1908), 24 T. L. R. 322, 325 (reversed in the Court of Appeal on other grounds. 24 T. L. R. 613), explaining the dictum of Lord Coleridge, C.J., in *Wells v Kingston-upon-Hull* (1875), L. R. 10 C. P. 402, 409.

(*f*) Cf. *Church v. The Imperial Gas Light and Coke Co.* (1837), 6 A. & E. 846, 861; 112 E. R. 324, 330; *Wells v. Kingston-upon-Hull*, *supra*, per Denman, J., 411.

(*g*) *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, 469—470.

(*h*) *E.g.*, *Scott v. Clifton School Board* (1884), 14 Q. B. D. 500.

to what these terms are. They must be proved by the production of the instrument itself if it is available. If it is not available, whether because of its loss or destruction or otherwise, the terms of the contract must be proved by the production of a copy of the instrument or by other secondary evidence of its contents, and cannot be proved by direct evidence of the intention of the party or parties as opposed to evidence of what is contained in the missing instrument. Furthermore, the instrument is conclusive evidence of the terms of the contract. No extrinsic evidence is admissible either to contradict the instrument by proving that the party or parties in reality intended something different, or to add to the instrument by proving that the party assented or the parties agreed to further terms than are expressed in the instrument. And this is so whether the extrinsic evidence so offered for the purpose of contradicting or adding to the written instrument is documentary evidence or oral. A written contract is what the written instrument says it is : nothing more, nothing less, and nothing different. The party or parties have by execution or otherwise accepted the instrument as the authentic expression of the contract, and they are bound by its terms accordingly. "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify, the written contract" (m).

This general principle may be illustrated by reference to the case of *Henderson v. Arthur* (n). The action was by a lessor against his tenant for a quarter's rent upon a covenant in the lease for the payment of rent quarterly in advance. The defendant set up the defence that by a verbal agreement made between himself and the lessor before the execution of the lease the lessor agreed to take, instead of cash, a bill of exchange payable in three months for the amount of each quarter's rent as it became due. It was held by the Court of Appeal that evidence of such an agreement was inadmissible, inasmuch as it contradicted the written instrument of lease, the covenant for the payment of rent in advance being on its true interpretation a covenant for payment in cash.

(m) *Per* Lord Denman in *Goss v. Nugent* (1833), 5 B. & Ad. 58, 64—65; 110 E. R. 713, 716.

(n) [1907] 1 K. B. 10.

The general principle thus illustrated, to the effect that when a contract is made in writing the contractual instrument is the exclusive and conclusive evidence of the terms of the contract, must be read in the light of a number of subsidiary rules, most of which, indeed, are merely explanatory of the logical limits of the principle, but some of which constitute genuine exceptions to it. We proceed, therefore, to the consideration of these subsidiary rules *seriatim*.

§ 52. Extrinsic Evidence of Invalidity

In the first place, it is obvious that the instrument, although conclusive as to the terms of the contract, is not conclusive as to its validity. Although he who puts his seal or signature to a written contract will not be heard to deny that the terms expressed therein are those to which he assented, he remains at liberty to plead and to prove by extrinsic evidence that some fact exists which invalidates the contract, and this is so even if the evidence so adduced contradicts the written contract. Thus he may prove that the consideration for the contract was an illegal consideration and that the contract is therefore void, even though the consideration expressed in the instrument is a lawful one (*o*). The legal requirements of the validity of the contract are the same in a written contract as in a verbal one, and none of these requirements can be excluded by the conclusive operation of a written instrument.

§ 53. Extrinsic Evidence of Subsequent Variation

In the second place, although a party to a written contract is not at liberty to allege or prove that the real terms of that contract were different *ab initio* from those expressed on the face of the instrument, he is at liberty to allege and prove that the written contract has subsequently to the making thereof been varied or cancelled by a subsequent agreement, even though it is merely oral (*p*). There is no general rule of modern law to the effect that a contract made in writing cannot be subsequently varied or cancelled except by another instrument in writing. In general, on the contrary, what is done in writing can be undone by word of mouth. As to this matter, however, there are several

(*o*) *Collins v. Blantern* (1767), 2 Wils. 341; 95 E. R. 847; 1 Smith's Leading Cases (13th ed.), 406.

(*p*) *Goss v. Lord Nugent* (1839), 5 B. & Ad. 58, 65; 110 E. R. 713, 716.

distinctions to be drawn, and it will be dealt with more fully at a later stage of the inquiry (q).

§ 54. Extrinsic Evidence of Implied Terms

In the third place, the general principle now under consideration applies only to the *express* terms of the contract. It has no application to those implied terms which the law itself reads into the contract by reference to the constructive or imputed intention of the parties. Extrinsic evidence is therefore admissible, even in the case of a contract in writing, to prove the existence of any facts which are relevant in determining whether any such implied terms will be read into the contract or not. For implied terms are derived by the law not merely from the express words of the contract, but also from its purposes and the circumstances in which it was made (r). Thus, in *Krell v. Henry* (s) there was a contract in writing whereby the defendant agreed to hire of the plaintiff a flat for "the days (but not the nights)" of June 26 and 27, 1902. To the knowledge of the plaintiff the defendant was hiring the flat so that he might view from it the coronation processions. No mention of this appeared in the writing, however. Nevertheless extrinsic evidence was admitted to show that the contract was made with reference to the coronation, so as to import an implied condition of determination if the coronation should not take place on the appointed day. Similarly, extrinsic evidence is admissible to prove the usage of the commercial market in which a written contract was made, for the law imports those usages as implied terms thereof (t).

§ 55. Extrinsic Evidence to Explain or Interpret Instrument

In the fourth place, although extrinsic evidence is not admissible to vary or add to the express terms of a written contract, it is admissible for the purpose of *explaining* those terms—for the purpose, that is to say, of proving the facts on which the correct interpretation of the written instrument depends. The interpretation of a written contract is a matter of law for the Court and not a matter of fact for a jury. The question is not what the parties

(q) See p. 484 *et seq.*, *post*.

(r) *The Moorcock* (1889), 14 P. D. 64; *Kelantan Government v. Du Development Co.*, [1923] A. C. 395.

(s) [1903] 2 K. B. 740.

(t) *Hutton v. Warren* (1836), 1 M. & W. 466, 475; 150 E. R. 517, 521; *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.*, [1916] 1 A. C. 314; *Cf. Forbes v. Scottish Flax Co., Ltd.*, [1943] 2 A. E. R. 366.

meant, but what the written instrument means. The parties are conclusively taken to have meant what they said, and to have meant nothing more and nothing less. But the meaning of a written instrument cannot always be determined by looking at it and reading its words. These words have to be applied to the facts of the case, and it is often impossible for the Court to know what an instrument means until it knows the circumstances in which it was made and the facts to which it refers. "In construing all instruments you must know what the facts were when the agreement was entered into" (u). "The deed must be construed according to the ordinary rules of construction, one of which is, that you are entitled to look at the circumstances existing at the date of the deed" (x). For this purpose, accordingly, extrinsic evidence is admissible with respect to a written instrument. The effect of such evidence may even be to alter the apparent meaning borne by the instrument on its face. It may show, for example, that certain words in the instrument are used not in their ordinary or popular sense, but in some special or technical sense established in the commercial market or in the particular locality in which the contract was made. For contracting parties are presumed to use the language of the market or the locality in which they deal with one another, even though this differs from the ordinary usage of English speech. Extrinsic evidence of a commercial usage is therefore admissible not merely, as already indicated, for the purpose of importing into the instrument a term implied by law, but also for the purpose of interpreting the words of the instrument in a manner conformable to such usage, though not in conformity with its natural and primary meaning. The extrinsic evidence which is thus admissible for the interpretation of a written contract does not, however, include direct evidence of the intention of the parties. The question, as we have said, is not what the parties meant, but what the instrument means. No party is permitted, therefore, to say what he meant by the instrument which he has signed; he is permitted merely to prove the facts which are necessary to enable the Court to ascertain what the instrument itself means (y).

(u) *Cannon v. Villars* (1878), 8 Ch. D. 415, at p. 419, *per* Jessel, M.R.

(x) *Roe v. Siddons* (1888), 22 Q. B. D. 224, at p. 233, *per* Lord Esher.

(y) "It must be remembered at the outset that the Court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties

It is otherwise, however, in the case of what is called a latent ambiguity or equivocation. It sometimes happens that, even after all the surrounding circumstances have been ascertained, it is impossible for the Court to interpret the instrument, inasmuch as the words of it are equally applicable to two or more different things. By a written contract of sale, for example, Peter may agree to sell his "black horse" to Stephen, and it may turn out that he has two black horses. In such a case extrinsic evidence is admissible as to the actual intention of the parties for the purpose of resolving this latent equivocation in the language of the instrument; and it can be shown accordingly which of the two horses Peter agreed to sell and Stephen agreed to buy (z).

In the case of a patent ambiguity (one which appears upon the face of the instrument, as opposed to one which does not become manifest until an attempt is made to apply the instrument to the facts of the case), however, the rule is otherwise, and no direct evidence of intention can be adduced for the purpose of resolving the doubt so created. It must be resolved, if possible, by the interpretation of the instrument itself, and if this is not possible, so that the meaning of the contract is impossible of ascertainment it will commonly be void for uncertainty. In *Saunderson v. Piper* (a), for example, the instrument in question was a bill of exchange, which in words was for £200, but in figures for £245. This was a patent ambiguity—a contradiction appearing on the face of the instrument. No evidence was admissible as to whether the parties meant the bill to be one for £200 or one for £245. But by a legal rule of interpretation—now embodied in the Bills of Exchange Act, 1882, s. 9 (2)—it was determined that the amount expressed in words prevailed over the amount expressed in figures.

and in contemplation of which the parties must be deemed to have used them: such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise as far as possible all parts; particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property." Lord Wright in *Inland Revenue Commissioners v. Raphael*, [1935] A. C. 96, 142.

(z) Halsbury's Laws of England (2nd ed.), vol. 10, p. 276.

(a) (1889), 5 Bing. N. C. 425; 132 E. R. 1163.

§ 56. *Extrinsic Evidence of Collateral Contract*

In the fifth place, although extrinsic evidence is not admissible for the purpose of adding a term to a written contract, the law will nevertheless admit extrinsic evidence for the purpose of proving that the parties to a written contract did at the same time enter into another and unwritten contract collateral or accessory to the written contract and dealing with the same subject-matter, provided that the unwritten contract in no way contradicts the written contract and is capable of operating consistently with its terms. And the consideration for this collateral or accessory contract may be nothing more than the executed consideration of the concurrent signature of the written contract (b). Thus in *Erskine v. Adeane* (c) a lease of a farm was executed between the parties, and at the same time in consideration of the execution of the lease by the tenant the landlord made an oral promise to reduce the amount of game upon the land. It was held that this oral contract was enforceable notwithstanding that its terms had not been incorporated in the written instrument. It is there said by Mellish, L.J.: "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have

(b) "It is evident, both on principle and authority," said Lord Moulton in *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30, 47, "that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract". But his Lordship then warns against too ready a reliance on this principle. "But such collateral contracts", he continues, "must from their very nature be rare. The effect of a collateral contract such as that I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter." As to whether the strictness of proof indicated by Lord Moulton is insisted on where the question is whether the statement is a collateral warranty or an inducing misrepresentation in respect of which rescission would not be available, see pp. 237 *et seq.*, *post*.

(c) (1873), L. R. 8 Ch. 756, 766.

entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself" (d). On the same principle a written contract may have attached thereto a collateral unwritten warranty: as in *De Lassalle v. Guildford* (e), where on the grant of a lease the landlord warranted orally that the drains were in good order (f). If, however, the unwritten collateral agreement in any manner conflicts with the terms of the written agreement the latter prevails, and the former is inoperative (g).

Since an unwritten contract can be thus attached to a written contract as collateral or accessory thereto, it is clear that *a fortiori* a collateral written contract would be valid on the same principle. The collateral oral agreement in *Erskine v. Adeane* (h) would have been equally valid if it had been in writing. Such a case, however, is subject to special considerations not applicable to a mere unwritten collateral agreement, and is therefore appropriately dealt with as distinct, and we proceed to the consideration of it accordingly.

§ 57. Several Documents may Constitute a Single Instrument

Notwithstanding the general principle that the terms of a written instrument cannot be varied or added to by extrinsic evidence, it is obvious in principle that there can be in general no reason why two or more separate documents should not constitute jointly a single instrument for the purpose of this rule. There may be a single contract embodied in a single instrument, even though that instrument consists of two or more documents. A common instance of this is the case in which a document executed by the parties refers on the face of it to some other document which is thereby constructively incorporated in the executed document: as when a written contract with an incorporated company purports expressly to be made with reference to the articles of association of the company, or when a contract of insurance expressly incorporates the written proposal on which the assurance is based. In such

(d) See also *Morgan v. Griffith* (1871), L. R. 6 Ex. 70.

(e) [1901] 2 K. B. 215; as to certain *dicta* in this case see *Heilbut, Symons & Co. v. Buckleton* (*supra*).

(f) For a recent application of the principle see *Otto v. Bolton and Norris*, [1936] 2 K. B. 46.

(g) *New London Credit Syndicate, Ltd. v. Neale*, [1898] 2 Q. B. 487; *Jacobs v. Batavia and General Plantations Trust, Ltd.*, [1914] 1 Ch. 287 (P. O. Lawrence, J.); [1924] 2 Ch. 329 (C. A.).

(h) (1873), L. R. 8 Ch. 756.

cases the contract is in legal contemplation constituted by a single instrument comprising the whole contents, so far as relevant, of both documents, just as if the contents of the one document had been repeated verbatim, and not merely by way of reference, in the other. *Verba relata inesse videntur*.

It is not essential for this purpose, however, that there should be any such express incorporation of one document in the other. Without any such express reference and incorporation two documents may be read together as constituting one instrument. This is so if it appears from their relations *inter se* and from the circumstances of the case that they were intended to be, and were accepted as being, in their joint operation the authentic expression of a single contract between the parties.

In *Smith v. Chadwick* (i) it is said by Jessel, M.R. : "When documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose." So in *Harman v. Richards* (k) it is said : "The question whether several deeds are to be taken as parts of the same transaction must, as I apprehend, depend upon all the surrounding circumstances of each particular case, and not upon the simple fact, whether the deeds are or are not by express reference grafted into or connected with each other."

Thus in *Edwards v. Aberayron Insurance Society* (l) it was held that a good written contract of insurance can be constituted by the joint operation of several different documents though not connected with each other by words of express reference. It is there said by Brett, J. (m) : "I see no reason why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance. It seems to me in the present case obvious as an inference of fact from the whole relation between the parties . . . that the intention was that the contract

(i) (1882), 20 Ch. D. 27, 62.

(k) (1852), 10 Hare 81, 85; 68 E. R. 847, 849.

(l) (1876), 1 Q. B. D. 563.

(m) At p. 588.

of insurance should be found not alone in the document of March, 1869, but in it and such of the rules [*i.e.*, the written regulations of the insurance company] as are applicable to a contract of insurance ”.

In *Jacobs v. Batavia and General Plantations Trust, Ltd.* (n), there were four distinct and successive documents : (1) a prospectus issued by the defendant company with respect to the issue of profit-sharing deposit-notes on certain terms therein set forth ; (2) a letter of application by the plaintiff for the allotment of deposit-notes “ subject to the terms of the prospectus ” ; (3) a letter of allotment from the company to the plaintiff ; and (4) a deposit-note issued to the plaintiff containing terms and conditions in accordance with the prospectus, save that it omitted one of the company’s undertakings as set out in the prospectus. The plaintiff sued the company for the enforcement of the omitted undertaking, and was held entitled to do so, notwithstanding that he was thereby seeking to add a term to the express provisions of the deposit-note held by him. The undertaking was expressed in the company’s prospectus ; this prospectus was incorporated by reference in the plaintiff’s letter of application ; this letter was incorporated by reference in the company’s letter of allotment. The prospectus became accordingly a contractual instrument as between the parties, and took effect as such notwithstanding the concurrent existence of another contractual instrument between the parties,—namely, the deposit-note itself. There existed between the parties a single contract embodied not in a single document, but in several, so connected as to constitute in law a single instrument for the purpose of the interpretation and enforcement of the contract. The following passage occurs in the judgment of P. O. Lawrence, J. (o) : “ The real point which in my opinion has to be determined here is, whether the deposit notes issued to the plaintiff do, in fact, express the whole bargain which was come to between him and the Trust, or, whether they only express part of such bargain, and the promise which the plaintiff seeks to enforce constitutes the rest of the bargain and still remains operative. If the latter be the correct view the promise would, in my opinion, be enforceable on one or other of the following grounds, either because the entire contract between the parties is contained in two written instruments which this Court will construe together . . . or else because the promise

(n) [1924] 1 Ch. 287 ; [1924] 2 Ch. 329 (C. A.)

(o) [1924] 1 Ch. at 297.

is a written collateral contract, the consideration for which was the entering into by the plaintiff of the contract to take the deposit-notes."

Where two instruments can thus be read together as one and as embodying jointly the terms of a single contract it is not necessary that they should be consistent with each other in the sense in which a collateral verbal contract must be consistent with the principal contract to which it is attached. Both instruments are of equal force and validity, and they must be read and construed together, just as if their terms were set out in one and the same document, the various provisions being harmonised with each other by the ordinary principles of interpretation. The provisions of one instrument may, for example, have to be read as creating an exception to the provisions of the other, or as imposing a condition upon a provision which in the other is apparently absolute. As was said by P. O. Lawrence, J., in the last-mentioned case (*p*): "That such a written collateral contract is capable of strict proof without coming into conflict with any rule of law or procedure, although it operates to add to or vary another contemporaneous written contract, cannot, I think, be disputed; it is altogether outside the rule of law relating to the inadmissibility of parol evidence to add to, vary or contradict the terms of a written instrument." Earlier in his judgment the learned Judge had said: "Had the promise which the plaintiff seeks to enforce in this action been merely a verbal promise, I should have felt constrained to hold that the rule of law, to which I have referred, was applicable and that evidence of such promise was inadmissible."

As indicated by P. O. Lawrence, J., in the first of the passages already quoted from his judgment, it may in certain cases be immaterial whether the two instruments are thus read together as a single instrument creating a single contract, or whether one of them is treated as constituting a collateral contract distinct from a principal contract embodied in the other. But whichever of these two views is taken in any case, the rule of consistency established in respect of collateral oral contracts has no application, being excluded by the circumstance that since both contracts are in writing each of them is of equal authority, and they must be reconciled with each other by means of interpretation and not by the rejection of one of them.

§ 58. Contracts Partly in Writing and Partly Unwritten

We have seen that a written contract is not necessarily constituted by a single instrument, but may be constituted by two or more instruments which are read together as constituting one only. This conclusion suggests the following question: Is it similarly possible for a contract to be made partly in writing and partly by spoken words so that the written and spoken words are read and construed together as constituting jointly one and the same contract? Or, on the contrary, is the rule that extrinsic evidence is not admissible to add terms to a written contract so absolute in its operation that every contract must be either wholly written or wholly unwritten? There would seem to be no reason in principle or authority why a contract should not be made partly in writing and partly without writing so long as the written instrument is not such as purports on its face to contain the entire contract. Let us suppose, for example, that a builder contracts orally to build a house for a certain price and within a certain time in accordance with certain written plans and specifications already prepared, and that these plans and specifications are there and then signed by the parties. Is this a written contract, or is it an unwritten contract, or is it a contract partly in writing and partly unwritten? It certainly cannot be regarded as exclusively a written contract, for the instrument does not contain essential terms of the contract—namely, the price and the time of completion. It might possibly be regarded by the law as purely unwritten, the signed plans and specifications being treated not as a contractual instrument, but merely as an evidential document, available as evidence, but not as conclusive or exclusive proof of the terms of the contract in this respect. It is submitted, however, that the true view of the matter is that such a contract is partly unwritten and partly in writing. The signed document, so far as it goes, is an operative contractual instrument—the only and conclusive evidence of the terms of the contract so far as relates to the plans and specifications of the building. As to the remaining terms, the contract is an unwritten one, governed by the ordinary rules applicable to any other unwritten contract (q). But if this is so, how is the existence of

(q) "The learned counsel . . . admitted as fully as their opponents could desire, that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record *any part* of their contract": Lord Morris, delivering the judgment of the Judicial Committee in *Bank of Australasia v. Palmer*, [1897] A. C. 540, 545 (the italics are not in the original). See also

such a hybrid contract to be reconciled with the undoubted rule that no extrinsic or verbal evidence is admissible for the purpose of adding terms to a contract in writing? For this is exactly the purpose and effect of extrinsic evidence as to the price for which the building was to be erected and as to the time allowed for completion. The answer is presumably this: that the rule excluding extrinsic evidence of additional terms applies only to instruments which on their face purport to embody the entire contract between the parties. When an instrument is of such a nature that on its face it is not intended to be a record of an entire contract there can be no objection to the admission of extrinsic evidence to prove what the remaining terms are. Most contractual instruments are of such a nature that they not merely set out the terms of a contract, but impliedly declare that these are the only terms. To attempt to add by extrinsic evidence new terms to such an instrument is to contradict and vary that instrument; and this is not permissible, for the instrument is conclusive. But it is quite otherwise if the document is on its face a record of part of the terms of the contract only. In such a case the remaining terms can be proved by extrinsic evidence so far as the terms so sought to be added are consistent with those expressed in the instrument (r).

§ 59. Extrinsic Evidence that Document Executed Not as a Contractual Instrument but *Alio Intuitu*

In the next place, it is to be observed that, although an instrument is conclusive proof of the terms of the contract, a document is not conclusive proof that it has been in fact executed or otherwise accepted by the parties as a contractual instrument. Even though it has been executed under the seal or hand of the parties, extrinsic evidence is admissible to show that it was executed *alio intuitu* and not *animo contrahendi*—that it was sealed or signed for some other purpose, and not as the authentic record of an existing contract between the parties. If this can be proved, the document, though in appearance a contractual instrument, has been shown not to be such in truth, and it will, therefore, not operate as such. A system of law is readily conceivable in which

Jeffery v. Walton (1816), 1 Stark. 267; 171 E. R. 469; *Malpas v. London and South Western Ry.* (1866), L. R. 1 C. P. 336; Phipson, *Law of Evidence* (7th ed.), 556, and cases collected on pp. 566 ff.

(r) As to whether extrinsic circumstances can be relied upon to show that a document, appearing on the face of it to be a complete statement of the contract between the parties, is nevertheless incomplete, see Phipson, *op. cit.* 556, and *Gillespie Brothers & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q. B. 59.

the rule is very different. The rule might be that he who puts his seal or his signature to a document which purports to be the record of a contract made by him will never afterwards be allowed to dispute his seal or signature on the plea that he did not intend the document to be what it so appears to be, but signed it with some other purpose and intent. But this is not the law. Subject only to the rule of estoppel, whereby a man is precluded from denying the truth of a representation by which he has misled another, a document, even though apparently executed as a contractual instrument, is not in truth valid and operative as such unless it was executed with that intent. It may have been executed for some quite different reason, and, if so, the law will permit this to be proved as a good defence to an action upon the document. In the language of the older pleaders, he who is sued on such a document can plead *non est factum*—that notwithstanding his seal or signature it is not his deed or instrument. Thus in *Jervis v. Berridge* (s) A had agreed to buy a piece of land from a certain society, and before the contract had been signed he agreed with B to transfer to him his interest under the contract on certain terms. For the purpose of enabling B to deal directly with the society a memorandum of this assignment was prepared and executed by A. This memorandum set out some of the agreed terms, but at B's request other terms in A's favour were omitted from the document. B thereafter in pursuance of the assignment obtained the land from the society, but refused to fulfil in A's favour the terms omitted from the document. In an action for the enforcement of those terms B contended that extrinsic evidence was not admissible to add any terms to the document. It was held, however, that the document was not a contractual instrument within the meaning of the rule, having been signed not as an operative instrument *inter partes*, but *alio intuitu* as a document required to enable B to deal directly with the society. In the words of Lord Selborne: "The written document signed by the plaintiffs and purporting to be a transfer was not . . . a contract valid and operative between the parties, but omitting (designedly or otherwise) some particular term which had been verbally agreed upon; but was a mere piece of machinery obtained by the defendant from the plaintiffs as subsidiary to and for the purpose of the verbal and only real agreement, under circumstances which would

(s) (1873), L. R. 8 Ch. 351.

make the use of it for any purpose inconsistent with that agreement dishonest and fraudulent" (t).

So in *Pattle v. Hornibrook* (u) the facts were as follows. The plaintiff signed an agreement for a lease to be granted to her by the defendant. The agreement was thereafter signed by the defendant also, who handed it to his solicitor with instructions not to part with it except on condition that the plaintiff obtained some other responsible person to join with her in the lease. The plaintiff refused to fulfil this condition and sued for the enforcement of the written agreement so executed by both parties. It was held that extrinsic evidence of the foregoing facts was admissible, not as contradicting the instrument, but as showing that it was not executed by the defendant as a binding agreement, but merely as a counter-offer in reply to the proposal made by the plaintiff. Stirling, J., says (x): "Evidence may be given to show that there was no agreement between the plaintiff and defendant; and the defendant has satisfied me that he never intended to accept the plaintiff as sole tenant . . . the defendant refused to enter into an agreement on the terms of the written document, but at the same time made a counter-offer, which was declined."

§ 60. Extrinsic Evidence that Execution Conditional Merely

The various subsidiary rules with which we have so far dealt are not exceptions to or infringements of the general principle as to the conclusive effect of a written instrument of contract, but are merely expositions of the logical limits of that principle. We come now to the consideration of a rule which is in reality an anomalous exception to the main principle. Extrinsic evidence is admissible to show that a written instrument, though on its face it shows an unconditional contract of immediate operation, was nevertheless executed with intent that its operation should be conditional only or should be postponed. As we have seen (y), an instrument whose immediate and unconditional operation is thus excluded by an extrinsic proviso attached to its execution is called in the case of deeds an *escrow* (i.e., scroll), and as the same rule extends in substance to instruments other than deeds, there seems no reason why the term *escrow* should not be used generically as applicable to such instruments also. The doctrine of the provisional execution

(t) At p. 359.

(u) [1897] 1 Ch. 25.

(x) At p. 31.

(y) See p. 66, *ante*.

of instruments to take effect at a later time, or on some condition not expressed in the instrument itself, was first developed in connection with deeds, and was extended later by analogy to unsealed instruments. In the case of deeds it had its origin in the rule that a deed was not completely executed by sealing merely, but required delivery also. Until delivered it was not operative, notwithstanding that it had been sealed. On this basis was founded the doctrine that the delivery might be conditional only; the sealed instrument might be delivered not as an immediately and unconditionally operative deed, but as an escrow. The law as to delivery of deeds has already been considered (z), and it is referred to here merely in its aspect as the historical origin of the rule which is now under consideration. This rule of conditional and postponed operation in its general form, as applicable to all contractual instruments and not merely to deeds, is illustrated by the following cases.

In *Davis v. Jones* (a) the agreement in question was a written agreement for the lease of a house. The document set out the terms of letting, but did not state the date at which the term was to commence. It was held that extrinsic evidence was admissible to show that at the time of execution it was verbally agreed that the landlord was to effect certain repairs, and that the lease was not to commence nor the rent become payable until those repairs were done. Jervis, C.J., speaks as follows: "A written instrument does not necessarily operate from delivery; it is competent to a party to show that it was delivered as an escrow, and that though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event" (b).

So in *Wallis v. Littell* (c) it was held that extrinsic evidence was admissible to prove that on the execution of a written agreement for the assignment of a lease it was verbally agreed that the transaction was conditional on the consent of the landlord being given within a reasonable time thereafter. In the words of Erle, C.J., "It is in analogy with the delivery of a deed as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation" (d). So in *Pym v. Campbell* (e) it was similarly held that evidence was admissible to show that a

(z) P. 64, *ante*.

(a) (1856), 17 C. B. 625; 139 E. R. 1222.

(b) At p. 634; E. R. 1225.

(c) (1861), 11 C. B. (N.S.) 369; 142 E. R. 840.

(d) At p. 375; E. R. 842.

(e) (1856), 6 E. & B. 370; 119 E. R. 903.

document signed by the defendant, and amounting on the face of it to an absolute and immediate agreement for the purchase of a share of an invention, was in fact executed by the defendant, as the plaintiff well knew, with intent that it should not operate as an agreement until and unless a certain engineer expressed his approval of the invention.

The rule so established and illustrated must, it is submitted, be regarded as a genuine exception to the general principle as to the conclusive operation of a written instrument. It cannot be logically reconciled with that general principle. Its effect is to vary the written instrument by making the contract conditional and postponed in its operation, whereas by the terms of the instrument it is unconditional and immediate. It is true that attempts have been sometimes made to reconcile this special rule as to escrows with the general principle by treating the extrinsic evidence as proving that the instrument is not contractual at all, having been executed not with the necessary *animus contrahendi* but *alio intuitu*. This is the view expressed, for example, in the reasoning of the Court in *Pym v. Campbell* (f). It is submitted, however, that this is not so. An escrow, though not immediately and unconditionally operative, is immediately and presently a binding contract. It is a contract which is subject to a condition, just as if that condition had been expressed in the instrument itself. There is no logical distinction between a transaction which is conditionally a contract and one which is a conditional contract. Pending the fulfilment of the condition precedent on which an escrow has been made dependent by the extrinsic intention of the parties, the contract is just as much binding on the parties as if that condition had been expressed in the deed. An escrow is not a mere revocable offer; it is an actual, though conditional, contract. Yet this condition is permitted to be imported into the contract by extrinsic evidence in infringement of the general principle. The truth of the matter would seem to be that the doctrine of delivery by way of escrow was established long before the general principle as to the inadmissibility of extrinsic evidence with respect to written instruments, and that it has survived the establishment of that principle. Notwithstanding that principle, therefore, the law allows a man who has executed an instrument absolute in its terms to plead and prove that it is conditional. Doubtless, however, the condition which may be thus attached to a contract by the execution of the

(f) (1856), 6 E. & B. 370; 119 E. R. 903.

contractual instrument as an escrow must relate to the entire contract, and not to one or more of its terms only. It is not to be supposed that an instrument may be executed as absolutely operative in part and conditionally operative as to the residue. A condition as to part of the contract must be expressed in the instrument, though a condition as to the entire contract may be imposed extrinsically.

§ 61. Extrinsic Evidence of Mistake

Extrinsic evidence is on occasion admissible, notwithstanding the general principle, for the purpose of proving that the instrument was executed by one or both of the parties under some mistake as to its nature or contents. The doctrine of operative error in the making of contracts is, however, one of difficulty and complexity, and must be reserved for special and separate consideration in a later chapter. It is sufficient to say here that mistake is of different kinds and produces different effects in different cases. In some cases it is wholly irrelevant and inoperative; in others it makes the contract void; in others it merely makes the contract voidable; and in others it has the result of entitling either party to have the instrument rectified by judicial decree so as to correct the mistake in question.

CHAPTER VIII
CONTRACTS WHICH REQUIRE WRITING

§ 62. Contracts which Must Be Made in Writing

In respect of the legal requirement of writing for their validity, all contracts are divisible into three kinds. The first class comprises those contracts which are invalid unless *made* in writing. That is to say, they must be embodied in an operative instrument as already defined (a), otherwise they are void. The second class consists of those contracts which need not be *made* in writing but must at least be *proved* in writing, otherwise they are unenforceable. That is to say, they cannot be sued upon in the absence of some document (not necessarily an *instrument*) of such a nature and of such contents as to amount to a written acknowledgment of the existence and terms of the contract on the part of the defendant. All other contracts belong to the third class, those, namely, which do not require either an instrument or a document. These do not need either to be made in writing or to be proved in writing; they may be made and proved by parol merely.

Of contracts belonging to the first class—contracts which must be made in writing—which are necessarily *instruments* in their nature—the following are the chief examples.

1. Contracts made without valuable consideration. As already explained, these are void unless made by deed (b).

2. Contracts made by Corporations Aggregate. At common law the contracts of corporations aggregate must in general be made in writing under the corporate seal. This rule, however, has been extensively derogated from both by the common law itself (c) and by statutory provisions as to the contracts of particular kinds of corporations (c). As an example of a statutory exception may be taken the case of a company under the Companies Act, 1929. That Act (d) in effect empowers a company incorporated under its

(a) See p. 139, *ante*.

(b) See p. 97, *ante*.

(c) See pp. 141 *et seq.*, *ante*.

(d) S. 29.

provisions or the provisions of previous Companies Acts to make contracts in a manner similar to that required or permitted in the case of an individual person acting in his natural capacity, so that the company's common seal is necessary only for those contracts where such an individual person must use his seal. Save so far as any special exceptions exist, however, the common law rule requiring corporations aggregate to contract in writing under seal remains in full force and effect.

3. **Marine Insurance.** A contract of marine insurance is invalid unless embodied in the contractual instrument known as a policy. This result is produced by the statutory provisions contained in the Marine Insurance Act, 1906 (e), and the Stamp Act, 1891 (f). The purpose of this requirement is the collection of revenue from the stamping of such policies.

4. **Negotiable Instruments.** The peculiar quality of negotiable instruments is necessarily confined to contracts which are made in writing and therefore embodied in a contractual instrument. Verbal contracts may be *transferable*, but only written contracts can be *negotiable*. To be negotiable means to be assignable by means of the delivery of the instrument itself in which the contract is embodied, and to be assignable with such effect that an assignee for value and in good faith obtains a good title irrespective of any want or defect of title in the assignor. Contracts which possess this special form of assignability are to be counted therefore among those which require to be made in writing. The chief examples of negotiable instruments are bills of exchange, promissory notes, bank notes, cheques and bonds or debentures payable to bearer (g).

5. **Bills of Lading.** A bill of lading is a contractual instrument signed by or on behalf of a shipowner acknowledging the receipt of cargo for carriage by sea and setting out the terms of the contract of carriage. There is no rule of law which requires that a contract for the carriage of goods by sea—a contract of affreightment, as it is called—shall be embodied in such a bill of lading or that it shall in any other manner be made or proved in writing. A contract of carriage made in the form of a bill of lading possesses,

(e) S. 22. The form appears in Schedule I of the Act.

(f) S. 93 (1).

(g) As to bills of exchange and promissory notes see Bills of Exchange Act, 1882, ss. 3 (1), 17 (2), 83 (1).

however, certain characteristic qualities and incidents which do not exist in the case of a verbal contract for the same purpose. Although a bill of lading is not a negotiable instrument, its endorsement and delivery amount not merely to a transfer of the property in the cargo represented thereby, but also to an assignment of the contract of carriage itself and of the rights and obligations of the cargo owner thereunder (*h*). To the extent, therefore, to which a contract of affreightment embodied in a bill of lading differs in its legal incidents from the same contract made verbally, it is correct to class this kind of contract amongst those which require to be made in writing (*i*).

§ 63. Contracts which Must be Proved by Writing

From contracts which thus require to be made in writing we pass to the consideration of those which require to be proved by some writing—represented, that is to say, by a document which, though it need not be a contractual instrument, must at least be evidentiary of the contract, that is to say, must contain an admission of its existence and terms: a letter, for example, written and signed by one of the parties subsequently to the making of an oral contract and setting out the provisions of it.

The existence of contracts of this description is due to certain statutory provisions, of which the most important are section 4 of the Statute of Frauds, 1677 (*k*), section 40 of the Law of Property Act, 1925, and section 4 of the Sale of Goods Act, 1893 (*l*).

Section 4 of the Statute of Frauds, as originally enacted, was as follows: “no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or mis-carriages of another person; or to charge any person upon any agreement made upon consideration of marriage; [or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them;] or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing,

(*h*) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111).

(*i*) Cf., however, *Sewell v. Burdick* (1884), 10 App. Cas. 74, especially *per* Lord Bramwell, 105.

(*k*) 29 Car. 2, c. 3.

(*l*) Another such enactment is s. 6, Moneylenders Act, 1927.

and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised”.

That part of section 4 of the Statute of Frauds which we have enclosed in square brackets was repealed by the Law of Property Act, 1925 (m), and in its place the following enacted (n): “No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised” (o).

Section 4 of the Sale of Goods Act, 1893, enacts (in subsection (1)) that “a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf”.

In our discussion of these several statutory provisions we shall consider first, what contracts fall within them; and with respect to the Sale of Goods Act the alternative to writing which it allows; secondly, the nature of the writing required by the statutes; thirdly, the operation of the statutes where a contract fails to comply with their requirements; and fourthly, the extent to which, despite such non-compliance, the parties may take action to enforce the contract or claims arising out of acts done in performance of it.

§ 64. Contracts within section 4 of the Statute of Frauds and section 40 of the Law of Property Act

1. **Contract by Executor or Administrator to Answer Damages out of his own Estate.** An executor or administrator who duly performs the duties laid upon him by law is not liable out of his own estate for the obligations of his testator or intestate (p). There is no legal reason, however, why he should not take upon himself by contract personal liability in respect of the deceased's obligations, but such a contract must be evidenced by writing as required by section 4.

(m) S. 207, and Sched. 7.

(n) S. 40 (1).

(o) “Sale”, “disposition” and “land” are defined in s. 205 (1), paras. (xxiv), (ii) and (ix) respectively.

(p) Williams, *Executors and Administrators* (12th ed.), vol. 2, 1164.

The Statute does not apply to a contract made before, even though in contemplation of, the promisor's being appointed administrator (*q*). It would apply, however, to the promise of an executor made before the grant of probate, for an executor derives his office from the will itself, which becomes operative on the testator's death, and not from the grant of probate.

2. Contract to answer for the Debt, Default or Miscarriages of another person. As this clause of the section refers to the debt, default or miscarriage of *another* person it does not apply to a contract creating a liability in the promisor independent of the liability of any other person. It affects only contracts which create a liability *collateral* to, *i.e.*, conditional on the non-performance of, the liability of some other person; not to those creating an *original* liability in the promisor. As was said by the Court of King's Bench in *Birkmyr v. Darnell* (*r*), "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *if he does not pay you, I will*; this is a collateral undertaking, and void without writing, by the Statute of Frauds; but if he says, *Let him have the goods, I will be your paymaster or I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." "There can be no suretyship", said Lord Selborne in *Lakeman v. Mountstephen* (*s*), "unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."

A contract to answer for the debt, default or miscarriages of another is known as a contract of guarantee or suretyship.

As a promise, to be within the Statute, must be conditional on the non-performance of a liability on the part of some other person, it follows that if, upon the giving of the promise, the liability of that other person is discharged, that promise will not be a guarantee. Thus in *Goodman v. Chase* (*t*) the defendant, in consideration of the plaintiff's releasing from custody a judgment

(*q*) *Tomlinson v. Gill* (1756), Amb. 330; 27 E. R. 221.

(*r*) (1704), 1 Salk. 27, 28; 91 E. R. 27; 1 Smith's Leading Cases (13th ed.), p. 331.

(*s*) (1874), L. R. 7 H. L. 17, 24.

(*t*) (1818), 1 B. & Ald. 297; 106 E. R. 110.

debtor whom the plaintiff had caused to be taken under a *ca. sa.*, promised to pay the judgment debt or return the judgment debtor into custody. The release of the judgment debtor from custody operated to discharge him of his liability under the judgment. It was accordingly held by the Court of King's Bench that the defendant's promise was not a guarantee but an original promise. "The words in the 4th section of the Statute of Frauds have always been construed to mean, that the person for whose debt the collateral promise is made must still remain himself liable for the debt. But here *Chase junior* was discharged from the debt" (u).

It has also been laid down that to be collateral to an original liability a promise must be to the creditor to whom that original liability is owed; otherwise it will be outside the statute. Thus if A is under a liability to B, a promise by X to Y that A will perform his obligation to B is not within the Statute (x), nor yet a promise by X to Y that if A fails to perform his obligation to B, X will make good the default (y).

So again, if the promisee is not to look to any third party at all, but is to rely solely on the credit of the promisor, the promise will not be within the Statute. Such a promise, to distinguish it from a guarantee, is sometimes described as an indemnity. An illustration is afforded by *Guild v. Conrad* (z). There the defendant, to induce the plaintiffs to accept certain bills of a firm of Demerara merchants, promised to provide the plaintiffs with funds to meet the bills on their maturity. This was held to be a promise of indemnity and not a guarantee, and out of the Statute accordingly. The ground of the decision was thus expressed by Davey, L.J. (a): "there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default

(u) *Ib.*, per Abbott, J., 302; E. R. 112.

(x) *Hargreaves v. Parsons* (1844), 13 M. & W. 561; 153 E. R. 235.

(y) *Thomas v. Cook* (1828), 8 B. & C. 728; 108 E. R. 1213; *Wildes v. Dudlow* (1874), L. R. 19 Eq. 198, following *Reader v. Kingham* (1862), 13 C. B. (N.S.) 344; 143 E. R. 137, in which the Common Pleas had refused to follow the contrary decision of the King's Bench in *Green v. Cresswell* (1839), 10 A. & E. 453; 113 E. R. 172; *Re Bolton* (1892), 8 T. L. R. 668; *Guild v. Conrad*, [1894] 2 Q. B. 885, where the Court of Appeal approved of *Thomas v. Cook*, *Wildes v. Dudlow*, and *Re Bolton*.

(z) [1894] 2 Q. B. 885.

(a) P. 896.

or not. In my opinion this was a promise to indemnify, and therefore not within the Statute . . . ”.

The essential characteristics of a promise which falls within the Statute as being a guarantee may be summarised in the words of Vaughan Williams, L.J. (b) : “ in any case where, in substance and in fact, an obligation has been undertaken by a person to the creditor to pay a debt due from another person, for which that other remains responsible, in the event of his making default, *prima facie* that is a guarantee, and the case comes within the 4th section of the Statute of Frauds ”.

Although, however, it is only contracts of guarantee which fall within the Statute, the Statute does not apply to all contracts of guarantee. Where the guarantee is merely an ancillary term in some contract the main purpose of which is outside the Statute, the Courts refuse to apply the Statute to the term as to the guarantee. “ If the subject-matter of the contract ”, said Vaughan Williams, L.J., in *Harburg India Rubber Comb Co. v. Martin* (c), “ was the purchase of property—the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker’s office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section.”

Thus a contract of *del credere* agency is not within the Statute although it is a term of such an agency that the agent should guarantee that the person with whom he makes a contract on his principal’s behalf will perform his obligations under that contract (d). So where the promisor was the sub-purchaser of some linseed his promise to the head vendor to pay the balance of purchase money owing by the purchaser to the head vendor in order to induce the head vendor to relinquish his vendor’s lien was held to be outside the Statute (e). “ At the time when the promise was made the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more

(b) *Danys v. Buswell*, [1913] 2 K. B. 47, 54.

(c) [1902] 1 K. B. 778, 786.

(d) *Couturier v. Hastie* (1852), 8 Ex. 40, 55; 155 E. R. 1250, 1257; see also *Sutton v. Grey* (1893), 69 L. T. 354; on appeal, [1894] 1 Q. B. 285.

(e) *Fitzgerald v. Dressler* (1859), 7 C. B. (N.S.) 374, 394; 141 E. R. 861, 869.

nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the Statute" (f) (g).

3. *Contract in Consideration of Marriage.* This clause of the section, as was early settled, applies not to contracts between two persons to marry each other, but to contracts in which, in consideration of a marriage taking place, the promisor promises to do something other than marry the promisee (h).

4. *Contract Not to be Performed within the Space of One Year from the Making Thereof.* This clause of the section has been much considered by the Courts and the decisions establish that its application is much narrower than a first reading of its words would suggest. Except in one case no contract is within the clause if all that one of the parties is required to do may possibly, conformably with the contract, be performed within the year. Thus in *Donellan v. Read* (i) a landlord agreed with his tenant to do certain repairs in consideration of the tenant paying an increased rent for the remainder of the term. At the time of this agreement there were still several years of the term to go, but the Court of King's Bench held that the agreement was outside the Statute. "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case" (k).

(f) See also *Castling v. Aubert* (1802), 2 East 325, 331; 102 E. R. 393, 395; and *Anstey v. Marden* (1801), 1 B. & P. N. R. 121, 127 E. R. 106. In the latter case it was said that an agreement to purchase debts at a discount was not within the Statute.

(g) An endorsement on a bill or note, although operating as a guarantee, is not within the Statute of Frauds *McCall Bros., Ltd. v. Hargreaves*, [1932] 2 K. B. 423.

(h) *Harrison v. Cage* (1698), 1 Ld. Raym. 386, 388; 91 E. R. 1156; *Cork v. Baker* (1717), 1 Strange 31; 93 E. R. 367.

(i) (1832), 3 B. & Ad 899, 906, 110 E. R. 330, 333.

(k) See also *Cherry v. Heming* (1819), 4 Ex. 631; 151 E. R. 1367; *Smith v. Neale* (1857), 2 C. B. (N.S.) 67, 140 E. R. 337; *Milson v. Stafford* (1899), 80 L. T. 590; *Peter v. Compton* (1691), Skinner 353; 90 E. R. 157; 1 Sm. L. C. (18th ed.), 350; *Boydell v. Drummond* (1809), 11 East 142; 103 E. R. 958; *McGregor v. McGregor* (1888), 21 Q. B. D. 421. *Reere v. Jennings*, [1910] 2 K. B. 522, which was before a Divisional Court, cannot be reconciled with these authorities and must, it is thought, be regarded as incorrectly decided: see Williams, Statute of Frauds, 34-39.

The exception mentioned in the last preceding paragraph is the case where the contract could be performed within the year in accordance with its terms only because a power is reserved to one or both parties to terminate it by a notice which might expire within the year. In such a case the Statute will apply notwithstanding the power to determine the contract within the year (l).

It is now settled that a contract to enure for not longer than a year commencing on the next day after the making of the contract cannot be within the Statute (m). In this connection it may be observed that where a contract is expressed to be for a period from a certain date the period commences on the day next following that date (n); so that where a contract is for a year from the date thereof (being the date on which it is made) it will not be within the Statute.

5. Contract for the Sale or Other Disposition of Land or Any Interest in Land. These words of the Law of Property Act, 1925 (o), are in substitution for *any contract or sale of lands, tenements or hereditaments or any interest in or concerning them* in section 4 of the Statute of Frauds as it was originally enacted. No doubt the new provision is substantially the same as that which it replaces; but in the absence of any authoritative judicial pronouncement it would be unsafe to assert that no change at all has been made. In this connection *Horsey v. Graham* (p) may be considered. The defendant in that case was an hotel-broker and he had been instructed by the lessee of a public-house to endeavour to sell the lease. The defendant himself had no interest in the lease nor was it contemplated at any relevant time that he should acquire any such interest. He contracted with the plaintiff "to get [for the plaintiff] the lease and everything for . . . £60 cash". This contract was held by the Court of Common Pleas to be within the Statute of Frauds, and there is, indeed, no great difficulty in applying to it the words "contract . . . of lands, tenements or hereditaments or any interest in or concerning them". These words do not appear to be confined to the case where the land or interest therein is to proceed from a party to the contract. The

(l) *Hanau v. Ehrlich*, [1911] 2 K. B. 1056; [1912] A. C. 39

(m) *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285; C. A. *ib.* 538.

(n) *Meggesson v. Groves*, [1917] 1 Ch. 158.

(o) S. 40 (1); "sale", "disposition" and "land" are defined: p. 166, n (o), *ante*.

(p) (1869), L. R. 5 C. P. 9.

words of the Law of Property Act, "contract for the sale or other disposition", however, seem far less readily applicable to such a case and it may well be thought that they mean a contract by which one of the contracting parties is to sell or dispose of the land or interest. If so, *Horsey v. Graham* would be differently decided to-day; and in at least one particular this provision of the Law of Property Act would be different in effect from the clause of the Statute of Frauds which it replaces.

The repealed words of the Statute of Frauds did not include a contract in which neither party was bound to dispose of or acquire any interest in land but merely to do something conditionally on such an interest being disposed of or acquired. Thus in *Boston v. Boston* (q) a wife contracted with her husband that if he would buy a particular house she would pay to him the amount of the purchase-money. This was held by the Court of Appeal not to be within the Statute of Frauds. The Law of Property Act does not appear to have effected any change in this particular (r).

§ 65. Section 4, Sale of Goods Act, 1893

Sub-section 1 of this section was enacted in substitution for section 17 of the Statute of Frauds. The earlier section referred to *goods, wares and merchandises*, the new one applies to *goods*; and goods are defined for the purposes of the Sale of Goods Act as follows (s): "'Goods' include all chattels personal other than things in action and money. . . . The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Sub-section 2 of section 4 declares that "The provisions of this section apply . . . notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery". This provision reproduces section 7 of Lord Tenterden's Act (t), which was passed to settle a doubt which had arisen as to whether section 17 of the Statute of Frauds applied to executory contracts of sale.

(q) [1904] 1 K. B. 124.

(r) For a full consideration of s. 40 of the Law of Property Act, 1925, see works on the special topic of sale of land or vendor and purchaser.

(s) S. 62 (1).

(t) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14).

Where the subject-matter of a contract of sale is growing timber, crops, or other things at the time of the contract attached to the soil the question may arise whether the contract concerns an interest in land and comes under the Law of Property Act or relates to goods and hence falls within the Sale of Goods Act. A similar question arose in respect of the earlier statutes now replaced by these enactments. So far as growing things were concerned the older law was thus summarised by Brett, J., in *Marshall v. Green* (u) : "Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller the case is not within the section (x). Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being fructus industriales, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself." With respect to non-growing things the older position is illustrated by *Lavery v. Pursell* (y). There there was a sale of the building materials of a house, and it was agreed that these were to be taken down and cleared off the ground in two months. It was held that the timber was an interest in land, and the contract therefore within section 4 of the Statute of Frauds.

Such was the law under sections 4 and 17 of the Statute of Frauds. Is the position in any way different under the Law of Property Act and the Sale of Goods Act? The Law of Property Act has

(u) (1875), 1 C. P. D. 35, 42.

(x) *I.e.*, s. 4, Statute of Frauds.

(y) (1888), 39 Ch. D. 508.

made no change in this respect, but at first sight it would seem that the Sale of Goods Act has, and that the effect of the definition of goods contained in that Act (z) is that things attached to the soil but not being *fructus industriales* are in any case to be regarded as goods if they are to be severed before sale or under the contract of sale (a). Some doubt, however, has been thrown on this conclusion by the decision of a Divisional Court in *Morgan v. Russell & Sons* (b). In that case there was a contract for the sale of cinders and slag "which had become part of the ground or soil itself, and were not definite or detached heaps resting, so to speak, upon the ground". The cinders and slag were to be removed by the purchaser. It was held that this was an agreement to grant an interest in land and not a sale of goods. If this decision is sound it would seem that despite the definition of goods appearing in the Sale of Goods Act the older law remains unchanged (c).

Where a person contracts to make from materials to be supplied by himself a chattel which, when completed, is to become the property of the other party, is the contract for the sale of goods or the hire of services? This question was considered by the Court of Appeal in the recent case of *Robinson v. Graves* (d) and the principle declared to be that if in substance what is bargained for is the skill and labour of a party so that the passing of the property in the materials upon which the skill and labour are exercised is merely an incidental consequence of the contract, then the contract is for work and services and not for the sale of goods. Accordingly the Court held that a contract by an artist to paint and deliver a portrait of his client's wife was a contract for work and services, although if the contract had been completed it would have resulted in the delivery of a chattel (e).

(z) Quoted p. 172, *ante*.

(a) Blackburn, *Contract of Sale* (3rd ed.), 16; *James Jones & Sons, Ltd. v. Tankerville*, [1909] 2 Ch. 440, 445.

(b) [1909] 1 K. B. 357.

(c) Williams, *Personal Property* (18th ed.), 164.

(d) [1935] 1 K. B. 579

(e) Before this decision it was sometimes thought that the true principle was that enunciated by Blackburn, J., in *Lee v. Griffin* (1861), 1 B. & S. 272, 277-8; 121 E. R. 716, 718, where the Court of Queen's Bench held that a contract between a dentist and his patient for the making of a set of artificial teeth was a contract for the sale of goods. Blackburn, J., in the course of his judgment, said: "In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the

Formalities Alternative to Writing Allowed by the Sale of Goods Act. (1) Acceptance and actual receipt of part of the goods. For the present purpose there is an acceptance when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not (*f*). For example, there is a sufficient acceptance for this purpose if the buyer inspects and samples the goods, even though he thereupon rejects them as not being of the quality contracted for (*g*). Not only must there be acceptance, however, but also actual receipt; but there is a sufficient receipt if the seller attorns to the buyer and holds the goods as his bailee (*h*); or, where the goods are in the possession of a third party, if that third party attorns to the buyer. An acceptance may take place before (*i*), contemporaneously with, or after (*k*) actual receipt.

(2) Earnest. (3) Part payment (*l*). “‘Earnest’ is some tangible token or gift, which need not be in money, given or actually transferred by the buyer to the seller to mark the conclusion of the bargain” (*m*). “An earnest”, said Wright, J. (as he then was), in *Farr, Smith & Co. v. Messers, Ltd.* (*n*), “must be a tangible thing, in which definition it may be that a deposit is included, but in the old cases it was always some tangible thing. That thing must be given at the moment at which the contract is concluded, because it is something given to bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of good faith, and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. If, on the other hand, the contract

contract would, in my opinion, nevertheless be a contract for the sale of a chattel.” This statement, however, was difficult to reconcile with the decision of the Court of Exchequer in *Clay v. Yates* (1856), 1 H. & N. 73; 156 E. R. 1123, in which a contract by a printer to print on paper supplied by himself and deliver five hundred copies of a book was held not to be a contract for the sale of goods; and *Robinson v. Graves* now overrules it.

(*f*) Sale of Goods Act, 1893, s. 4 (3).

(*g*) *Abbot & Co. v. Wolsey*, [1895] 2 Q. B. 97.

(*h*) *Castle v. Sturder* (1861), 6 H. & N. 828; 158 E. R. 311.

(*i*) *Cusack v. Robinson* (1861), 1 B. & S. 299; 121 E. R. 726.

(*k*) *Norman v. Phillips* (1845), 14 M. & W. 277; 153 E. R. 481; *Abbot & Co. v. Wolsey*, *supra*.

(*l*) As to what amounts to payment for this purpose see *Behnke v. Bede Shipping Co.*, [1927] 1 K. B. 649, 659.

(*m*) Blackburn, *Contract of Sale* (3rd ed.), 41.

(*n*) [1928] 1 K. B. 397, 408.

is fulfilled, an earnest may still serve a further purpose and operate by way of part payment " (o).

Sale of Goods Act and Statute of Frauds. A contract for the sale of goods will fall within section 4 of the Statute of Frauds if it is not to be performed within a year from its making, and in that case must comply with the requirements of both statutes (p).

§ 66. The Nature of the Memorandum or Writing Required under the Statute of Frauds, Sale of Goods Act, and Law of Property Act

1. Writing Must Set Forth All the Terms of the Contract. The writing must set forth the whole (q) of the terms of the contract.

Although the writing must set forth the whole of the terms of the contract, however, it need not do this expressly. If, in the absence of any contrary provision, a term would be implied by law in such a contract as appears from the writing, the writing, by the very fact of its silence on the matter, declares that that term is part of the contract (r). "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth" (s).

Terms other than those implied by law must either be disclosed in the writing by plain words or be discoverable from the writing (explained by any admissible extrinsic evidence) by reasonable inference (t). It is not enough that the writing is not inconsistent with the existence of a term. There must be reasonable certainty both as to the fact and the contents of that term. Extrinsic evidence is admissible for the purpose of explaining a writing under any of these statutes to the same extent as it would be admissible at common law to explain an instrument (u).

To the requirement that the writing should exhibit all the terms

(o) See further *Howe v. Smth* (1884), 27 Ch. D. 89, *per* Fry, L.J., 101-2.

(p) *Prested Miners Co., Ltd v. Garner, Ltd.*, [1910] 2 K. B. 776; affirmed by Court of Appeal, [1911] 1 K. B. 425.

(q) Williams, Statute of Frauds, 54-5

(r) Cf. pp. 33-4, *ante*.

(s) *Hoadly v. McLaine* (1834), 10 Bing. 482, 487; 131 E. R. 982, 984; *Gray v. Smth* (1889), 43 Ch. D. 208.

(t) Lord Cranworth, L.C., in *Caddick v. Skidmore* (1857), 2 De G. & J. 52, 55; 44 E. R. 907, 908.

(u) See p. 148, *ante*, *Bateman v. Phillips* (1812), 15 East 272; 104 E. R. 847; *Harrison v. Barton* (1860), 1 J. & H. 287; 70 E. R. 756; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527.

of the contract there is one exception, viz., that if the contract is a guarantee the writing need not state the consideration. This exception was introduced in 1856 by the Mercantile Law Amendment Act (x).

While (with the exception mentioned) the writing must set forth all the terms of the contract, it need not do more than this and state matters which are not part of the contract. In particular the writing need not set forth collateral contracts (y). A collateral contract may, of course, itself require to be in writing because independently of the main contract it also is within one or other of the statutes. Where a collateral contract is not of its own nature within one or other of the statutes, however, extrinsic evidence to prove it no more conflicts with the statutes than with the rule of the common law excluding evidence to add to, vary or contradict an instrument (z).

2. **Contracting Parties.** Not only must the writing disclose the terms of the contract but it must also, with the like degree of certainty (taking into account the assistance which may be had from admissible extrinsic evidence) indicate who are the contracting parties (a), and in what capacity (as, e.g., vendor, purchaser, lessor or lessee) they contract (b). The parties need not be mentioned by name, however; in the words of Lord Blackburn (c), "it is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram in his Treatise (d) calls evidence 'to prove intention as an independent fact'". Thus *proprietor* has been held to be a sufficient description of a party (e). On the other hand *vendor* has been regarded as insufficient (f).

A writing is not defective merely because one who is named as a contracting party is really an agent for an undisclosed

(x) 19 & 20 Vict. c. 97, s. 3.

(y) *Lindley v. Lacey* (1864), 17 C. B. (N.S.) 578; 144 E. R. 232; *Morgan v. Griffith* (1871), L. R. 6 Ex. 70; *Erskine v. Adeane* (1873), L. R. 8 Ch. 756.

(z) See p. 151, *ante*.

(a) *Williams v. Lake* (1859), 2 E. & E. 349; 121 E. R. 132.

(b) *Vandenbergh v. Spooner* (1866), L. R. 1 Ex. 317; *Dewar v. Mintoft*, [1912] 2 K. B. 373.

(c) In *Rossiter v. Miller* (1878), 3 App. Cas. 1124, 1153.

(d) Wigram, *Extrinsic Evidence* (5th ed.), Intr. Obs., p. 10.

(e) *Sale v. Lambert* (1874), L. R. 18 Eq. 1; *Rossiter v. Miller*, *supra*; see also *Catling v. King* (1877), 5 Ch. D. 660.

(f) *Potter v. Duffield* (1874), L. R. 18 Eq. 4; cf. *Commins v. Scott* (1875), L. R. 20 Eq. 11.

principal. In such a case extrinsic evidence is admissible to establish the principal's identity (g).

3. **Signature.** The several statutes require the writing to be signed. The usual meaning of *to sign*, in relation to documents, is "to attest or confirm by adding one's signature; to affix one's name to (a document, etc.)"; and *signature* means "the name (or special mark) of a person written with his or her own hand as an authentication of some document or writing" (h). In its usual and proper sense a signature is the name or mark of the signatory written by him personally on a document for the purpose of authenticating that document. Commonly a person signs by writing his name (either in full or in some abbreviated form, as the initial letters of it) or making his mark with a pen or pencil; but any other suitable instrument may be used, such as a typewriter or a rubber stamp (i). By whatever means the signature is produced, however, its function is to authenticate the document to which it is added.

For the purpose of these statutes, however, a writing may be regarded as signed although it is not authenticated by a signature. The leading case on this aspect of the statutory requirements is *Schneider v. Norris* (k). The writing there relied upon was an invoice headed: "London, 24th October 1812, Messrs. John Schneider and Co. bought of Thomas Norris and Co. Agents. Cotton yarn and piece goods. No. 3 Freeman's Court, Cornhill". The whole of this was printed, except the words Messrs. John Schneider and Co., which were in the handwriting of the defendant. Then followed a list of the articles sold, with the particulars, quantity and prices. It is clear that the printed name of the defendant did not authenticate the document and was not a signature in the proper sense. Nevertheless the Court of King's Bench held that the document was sufficiently signed to satisfy the Statute of Frauds. Lord Ellenborough, C.J., thus stated the reasons which had led him to this conclusion (l). "I cannot but think that a construction, which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing would be going a great way, considering how many

(g) *Trueman v. Loder* (1840), 11 A. & E. 589; 113 E. R. 539; see p. 411, *post*.

(h) New English Dictionary (Oxford), *sub nom.*, "sign", and "signature".

(i) Stroud, *Judicial Dictionary*, *sub nom.* "signed".

(k) (1814), 2 M. & S. 286; 105 E. R. 388.

(l) P. 288; E. R. 388.

instances may occur in which the parties contracting are unable to sign. . . . But here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written Norris and Co. with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the written contract." In other words it was not the printed name which authenticated the writing, but the act of the defendant in making out the invoice. By so doing, and not by signing the document, the defendant showed that he recognised the invoice as an authentic expression of the contract. As Dampier, J., said (m): "Here there is the handwriting of the party to be charged to the bill of parcels, which authenticates it as a memorandum of the bargain; the defendant has ratified the sale to Schneider and Co. by inserting their name as buyer to a paper in which he recognises himself as seller. That is sufficient to satisfy the object of the statute." It appears, therefore, that a writing may be sufficiently signed for the purpose of these statutes if it contains the name or initials of the party whose signature is necessary and that party by his conduct (which need not be the adding of his signature *stricto sensu*) recognises the writing as an authentic statement of the contract (n).

The statutes do not require a subscription. The signature, or the name which serves as such, need not be at the foot or end of the writing, but, if a real signature, must be in such a position as to relate to and authenticate the whole of the writing setting out the contract; and if a name treated as a signature, in such a position that were it a real signature it would relate to and authenticate the whole of the writing (o).

4. The signature required by the Statute of Frauds and the Law of Property Act may be supplied either by the party to be charged or by "some other person thereunto by him lawfully authorised". The Sale of Goods Act allows the same alternatives, but for the

(m) P. 290; E. R. 389.

(n) See also *Durrell v. Evans* (1862), 1 H. & C. 174, *per* Crompton, J., 187; *per* Blackburn, J., 190 ff.; 158 E. R. 848, 853, 855. In this case the Exchequer Chamber held to be signed a writing which Crompton, J., described as containing "nothing which could ordinarily be called a signature". See, further, Williams, Statute of Frauds, 82 ff.

(o) *Stokes v. Moore* (1786), 1 Cox 219; 29 E. R. 1137; *Ogilvie v. Foljambe* (1817), 3 Mer. 53; 36 E. R. 21; *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Cohen v. Roche*, [1927] 1 K. B. 169.

words quoted from the other two statutes are substituted "his agent in that behalf".

The statutes say nothing as to how the agent is to receive his authority. The matter is left to the common law (*p*) and no particular formalities are necessary. In particular the agent need not be appointed in writing (*q*). Sometimes the agent will be expressly and precedently authorised, sometimes his authority will be derived from subsequent ratification (*r*), sometimes it will be inferred as a fact from the circumstances, *i.e.*, it will be tacit, and sometimes it will be implied by the law (*s*). Illustrations of tacit and implied authority are afforded by the case of the auctioneer. An auctioneer, if he has not express authority, has implied authority to sign for the vendor. In addition he has tacit authority to sign for the purchaser (*t*). This tacit authority, however, is exceedingly evanescent and must be exercised either at the sale or so soon thereafter that the making or completing of the writing will yet be substantially part of the transaction of the sale (*u*). The auctioneer's clerk is impliedly authorised to sign for the vendor, but this authority, like that of his master to sign for the purchaser (*x*), is of a temporary nature and ceases upon the conclusion of the sale (*y*). The clerk has no such implied authority to sign for the purchaser, however, although he may well be expressly authorised to do so (*z*).

A solicitor has no implied authority to sign a writing on his client's behalf (*a*). He may, of course, be expressly authorised in this behalf (*b*), and that such an express authority has been conferred upon him may be inferred as a fact from the circumstances (*c*).

(*p*) *Maclean v. Dunn* (1828), 4 Bing. 722, 727; 130 E. R. 947, 949.

(*q*) *Coles v. Trecothick* (1804), 9 Ves. 234, 250; 32 E. R. 592, 598; *Olinan v. Cooke* (1802), 1 Sch. & Lef. 22, 31.

(*r*) *Maclean v. Dunn*, *cit. sup.*

(*s*) See pp 397, 398, *post*.

(*t*) *Emmerson v. Heels* (1809), 2 Taunt. 38; 127 E. R. 989.

(*u*) *Bell v. Balls*, [1897] 1 Ch. 663, 672; *M'Meekin v. Stevenson*, [1917] 1 I. R. 348, 354. As to whether the purchaser can revoke the authority see *Van Praagh v. Everidge*, [1902] 2 Ch. 266, 270 (reversed on another ground, [1903] 1 Ch. 434), and *Chaney v. Maclow*, [1929] 1 Ch. 461, 481.

(*x*) *Dyas v. Stafford* (1881), 7 L. R. Ir. 590, 600; reversed by the Irish Court of Appeal on other grounds: 9 L. R. Ir. 520; cf. Taunton, J., in *Bird v. Boulter* (1833), 4 B. & Ad. 442, 448; 110 E. R. 522, 524.

(*y*) *Dyas v. Stafford*, at p. 601.

(*z*) *Peirce v. Corf* (1874), L. R. 9 Q. B. 210, 215; *Bell v. Balls*, [1897] 1 Ch. 663.

(*a*) Cf. *Thirkell v. Cambi*, [1919] 2 K. B. 590.

(*b*) *North v. Loomes*, [1919] 1 Ch. 378; cf. *Smith v. Webster* (1876), 3 Ch. D. 49.

(*c*) *Daniels v. Trefusis*, [1914] 1 Ch. 788, 797.

The statutes say nothing as to the form in which the agent must sign, and hence he may sign his own name (*d*) or that of his principal (*e*), or he may expressly sign by procuration.

The same person may well be the agent of both parties (*f*), as in the case of the auctioneer already mentioned, but it has been held that one party may not, for the purpose of these statutes, be the agent of the other (*g*).

5. **Signature by Party to be Charged.** The several statutes require the writing to be signed only by the party to be charged; it is immaterial that the party seeking to enforce the contract, whether specifically or by suing for damages, may not have signed the writing (*h*). This does not, of course, mean that a party who has not signed may enforce the contract against a party who has signed, and at the same time rely on the statute as a defence to any counter-claim or other proceeding on the contract that the latter party may bring. The advantage of the statutes may be waived by a party if he sees fit (*i*); and by enforcing the contract a party must be taken to have waived his right to plead the statutes if he is afterwards sued upon the contract. "A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage" (*k*).

6. **Made Before Action Brought.** In general the writing required under each of these statutes must be in existence before the commencement of the action (*l*). This, indeed, follows readily enough from the words of section 4 of the Statute of Frauds, *viz.*, "no action shall be brought . . . unless the agreement . . . or some memorandum or note thereof shall be in writing . . ."; and

{*d*} *Sievwright v. Archibald* (1851), 17 Q. B. 103; 117 E. R. 1221, *Daniels v. Trefusis*, *cit. sup.*

(*e*) See *Graham v. Musson* (1839), 5 Bing. N. C. 603; 132 E. R. 1232.

(*f*) *Thompson v. Gardiner* (1876), 1 C. P. D. 777.

(*g*) *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720; *Farebrother v. Simmons* (1822), 5 B. & Ald. 333; 106 E. R. 1213. These decisions are adversely criticised by Lord Blackburn in his *Contract of Sale* (3rd ed.), 76.

(*h*) *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735; 132 E. R. 283; *Flight v. Bolland* (1828), 4 Russ. 298; 38 E. R. 817.

(*i*) *Cooth v. Jackson* (1801), 6 Ves. 12, 39; 31 E. R. 913, 927; *Ridgway v. Wharton* (1854), 3 De G. M. & G. 677, 689 ff.; 43 E. R. 266, 271.

(*k*) *Honyman, J.*, in *Smith v. Baker* (1873), L. R. 8 C. P. 350, 357.

(*l*) *Lucas v. Dixon* (1889), 22 Q. B. D. 357.

section 40 (1) of the Law of Property Act, 1925, is essentially the same. Section 4 of the Sale of Goods Act, 1893, however, is expressed somewhat differently. It declares that "A contract . . . shall not be enforceable by action unless . . . some note or memorandum in writing of the contract be made. . . ." These words replaced "no contract . . . shall be allowed to be good, except . . . that some note or memorandum in writing of the said bargain be made . . ." which appeared in section 17 of the Statute of Frauds. The difference between the language of these two sections and that of section 4 of the Statute of Frauds is appreciable. Nevertheless, sections 4 and 17 of the Statute of Frauds were for the present purpose construed alike (*m*); and the language of section 4 of the Sale of Goods Act, 1893, is not in this respect sufficiently different from that of section 17 of the Statute of Frauds to produce any difference in construction.

Where a person becomes a party to an action at a time after its commencement it is sufficient that any writing relied upon by him should be in existence before his so becoming a party (*n*). For him the action commences when he is joined in it.

7. Form of Memorandum. The writing need not be in any particular form. Letters, affidavits (*o*), a recital in a will (*p*), pleadings (*q*), have all on occasion been accepted as satisfying the statutory requirements. A writing need not have been intended as a confirmation of the contract or a promise to perform it nor need it have been made for the purpose of satisfying the relevant statute (*r*); but it must acknowledge the fact and terms of the contract. In *Gibson v. Holland* (*s*) a letter written by the defendant to his own agent was accepted as sufficient; and in *Bailey v. Sweeting* (*t*) a letter admitting the fact and terms of the contract but repudiating liability satisfied the Court. If, however, the writing not only repudiates liability, but also denies, or does not admit, the fact and terms of the contract it will not be sufficient.

(*m*) *Bill v. Bament* (1841), 9 M. & W. 36; 152 E. R. 16.

(*n*) *Farr, Smith & Co., Ltd. v. Messers, Ltd.*, [1928] 2 Ch. 145.

(*o*) *Lucas v. Dixon* (1889), 22 Q. B. D. 357.

(*p*) *Re Hoyle*, [1893] 1 Ch. 84.

(*q*) *Grindell v. Bass*, [1920] 2 Ch. 487.

(*r*) Cf. Sargant, J., in *Daniels v. Trefusis*, [1914] 1 Ch. 788, 789: "the unintentional by-product of satisfying the Statute of Frauds".

(*s*) (1865), L. R. 1 C P 1.

(*t*) (1861), 9 C. B. (N.S.) 843; 142 E. R. 332; see also *Thirkell v. Cambi*, [1919] 2 K. B. 290.

8. May Consist of Several Documents. The writing required by the several statutes need not be contained in one document. Two kinds of case may occur: (1) where there are several documents only some of which are signed; (2) where there are several documents all of which are signed. In both cases the question arises of whether the admission of extrinsic evidence to connect the documents does not conflict with the statutory requirement that the contract shall be written or evidenced in writing; and in the first case there is the further question of how far a signature on one document can be taken to authenticate another document.

With respect to the case where there is a signed and an unsigned document the principle is that if the signed document contains a sufficient reference to the unsigned document parol evidence to explain the reference and connect the two is admissible (*u*). What is a sufficient reference for this purpose has been answered differently at different times. Judicial opinion has shown a steady tendency to accept as sufficient references of an increasingly indefinite nature (*x*). The present position appears to be as follows. The reference need not on its face be to any particular document or even to any document at all (*y*). If the signed document contains anything calling for explanation before the Court can properly comprehend it and the evidence which may properly be given by way of explanation includes the unsigned document, the signed document sufficiently refers to the unsigned document (*z*).

Where both documents are signed extrinsic evidence to connect them will be admissible in every case where it would be admissible if one of the documents were unsigned. In addition, if both documents, although not referring to each other, yet refer to the same transaction or subject-matter, they are sufficiently connected, parol evidence being admissible to show the identity of reference (*a*).

It should be noticed that several sheets of paper do not necessarily constitute several documents but may amount to one docu-

(*u*) *Tawney v. Crowther* (1791), 3 Bro. C. C. 318; 29 E. R. 557.

(*x*) *Williams*, Statute of Frauds, 128 ff.

(*y*) *Ridgway v. Wharton* (1857), 6 H. L. C. 238; 10 E. R. 1287.

(*z*) *Long v. Millar* (1879), 4 C. P. D. 450; *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Oliver v. Hunting* (1890), 44 Ch. D. 205; *Stokes v. Whicher*, [1920] 1 Ch. 411.

(*a*) *Studds v. Watson* (1884), 28 Ch. D. 305; *Allen v. Bennet* (1810), 3 Taunt. 169; 128 E. R. 67; *Verlander v. Codd* (1823), Turn. & R. 352; 37 E. R. 1136.

ment. So a letter and its envelope have been held to be merely one document (b).

9. **Writing in Addition to Consideration.** It need scarcely be said that the requirement of writing under these statutes is by way of addition to and not in substitution for the common law requirement of consideration (c).

§ 67. The Operation of the Statutes where a Contract Fails to Comply with their Requirements

The statutes do not avoid the contract but simply say that no action shall be brought to enforce it. The result is that the contract is good for all purposes other than supporting an action (d) or a position which could be valid only if an action on the contract could be maintained (e). In particular such a contract is available in the following ways.

1. **As a Defence.** Where money has been paid or the title to other property has passed under or in pursuance of such a contract, that contract will be available as a defence to an action for the recovery of the money or property or for damages in lieu of such recovery, to the same extent as if the statutory requirements had been satisfied (f). Moreover such a contract, not because it is a contract but simply because it involves the element of consent, may on the principle *volenti non fit injuria* (g) prevent acts done under it from being tortious. It can operate in this way, however, only so long as the consent involved in it is not withdrawn by repudiation or otherwise (h). Apart from these cases it does not appear

(b) *Pearce v. Gardner*, [1897] 1 Q. B. 688.

(c) *Rann v. Hughes* (1778), 7 T. R. 350 n.; 101 E. R. 1014, overruling *dicta* to the contrary in *Pillans v. Van Meerop* (1765), 3 Burr. 1663; 97 E. R. 1035.

(d) *Crosby v. Wadsworth* (1805), 6 East 602; 102 E. R. 1419; *Leroux v. Brown* (1852), 12 C. B. 801; 138 E. R. 1119; *Maddison v. Alderson* (1883), 8 App. Cas. 467, 475, 488.

(e) *E.g.*: A enters into possession of land as a yearly tenant of B. After A has been some time in possession B orally agrees with A that he (B) will not terminate the tenancy until a period of at least three years has elapsed. Nevertheless within this period B purports to determine the tenancy. A cannot rely on the oral agreement as a defence because it would justify his retaining possession only if it created an interest in the land, *i.e.*, only if it were specifically enforceable, and, in the absence of part performance it would not be specifically enforceable, for it fails to comply with the statutory requirements. *Sidebotham v. Holland*, [1895] 1 Q. B. 378; 50 L. Q. R., at pp. 535-6.

(f) *Jones v. Jones* (1840), 6 M. & W. 84; 151 E. R. 331; *Thomas v. Brown* (1876), 1 Q. B. D. 714; *Low v. Fry* (1935), 152 L. T. 585.

(g) Salmond, *Torts* (10th ed.), 31 ff.

(h) *Crosby v. Wadsworth* (1805), 6 East 602; 102 E. R. 1419; *Carrington v. Roots* (1837), 2 M. & W. 248; 150 E. R. 748.

that a contract which fails to comply with the statutory requirements may be relied upon by way of defence (i).

2. To Support a Security. An unenforceable obligation under a contract not satisfying the statutory requirements, being nevertheless a subsisting legal obligation, will support a security in the same way as any other legal obligation (k).

3. Discharge of Such a Contract as Consideration. Both on principle and on authority it appears that the discharge of an obligation unenforceable by reason of non-compliance with the statutory requirements, or the promise of such a discharge, may constitute a valuable consideration in any case where such a consideration is required by the law (l).

§ 68. Extent to which, Despite the Absence of Writing, Parties may Directly or Indirectly Enforce the Contract

Despite the lack of writing the parties may sometimes in effect enforce the contract directly by calling in aid the doctrine of equity that a statute intended to prevent fraud will not be allowed to be used as an engine of fraud. This doctrine has been applied (1) where the defendant has by fraud prevented the execution of a sufficient writing (m); (2) where the plaintiff has partly performed the contract. The latter application of the doctrine is of much greater importance than the former, and we shall consider it in some detail. Furthermore, in some cases the parties may to a certain extent indirectly enforce the contract by framing their

(i) *Sidebotham v. Holland*, [1895] 1 Q. B. 378; *Perpetual Executors and Trustees Association of Australia, Ltd. v. Russell* (1931), 45 C. L. R. 146; *Williams*, Availability by way of Defence of Contracts not Complying with the Statute of Frauds, 50 L. Q. R. 532.

(k) See *Jones v. Jones* and *Low v. Fry*, *cit. sup.*

(l) *Re Davies*, [1921] 3 K. B. 628; *Dundas v. Dutens* (1790), 2 Cox 235; 30 E. R. 109. The report of this latter case in *Vesey Junior* (1 Ves. Jun. 196; 30 E. R. 298) differs considerably from Cox's report; but as Cox was of counsel in the case perhaps his report may be preferred to Vesey's. See also *Laycock v. Pickles* (1863), 4 B. & S. 497; 122 E. R. 546; and *Siqueira v. Noronha*, [1934] A. C. 332. There are authorities against the view stated above, but they were all decided at a time when it had not been finally settled that the Statute of Frauds did not avoid contracts but merely rendered them unenforceable by action. The most important of these authorities are *Warden v. Jones* (1857), 23 Beav. 487; 53 E. R. 191; on appeal 2 De G. & J. 76; 44 E. R. 916; and *Trowell v. Shenton* (1878), 8 Ch. D. 318. For a full discussion see *Williams*, Statute of Frauds, pp. 203 ff.

(m) *Cookes v. Mascall* (1690), 2 Vern. 200; 23 E. R. 730; *Montacute v. Maxwell* (1720), 1 P. Wms. 620; 24 E. R. 542; *sub nom. Maxwell v. Montacute*, *Proc. Ch.* 526; 24 E. R. 235; *Whitchurch v. Betts* (1789), 2 Bro. C. C. 559, 565; 29 E. R. 306, 309; *Wood v. Midgley* (1854), 5 De G. M. & G. 41; 43 E. R. 784.

claim in quasi-contract. This matter also calls for our consideration.

§ 69. Doctrine of Part Performance

Equitable Doctrine of Part Performance. Where a contract has been partly performed by one party a Court of equity will, in effect, sometimes enforce the contract at that party's suit notwithstanding the absence of a signed writing. The principle on which this is done was thus stated by Lord Cranworth, L.C. (n): "when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money".

In such a case the Court of equity considers that it is enforcing not the contract but the equities arising out of the part performance of the contract. The doctrine is so explained by Lord Selborne, L.C., in his famous judgment in *Maddison v. Alderson* (o). "In a suit founded upon part performance", said Lord Selborne, "the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and

(n) In *Caton v. Caton* (1866), L. R. 1 Ch. 137, 148; the Lord Chancellor's decision was affirmed in the House of Lords, where, however, the contention that there was part performance was abandoned: L. R. 2 H. L. 127.

(o) (1883), 8 App. Cas. 467, 475.

liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. . . . it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract 'concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract."

These statements of the doctrine by Lord Cranworth and Lord Selborne base it on fraud or injustice to the plaintiff: the doctrine will apply where the case is such that if, after the plaintiff has partly performed the contract, the defendant should be allowed to rely on the lack of a writing a fraud would be perpetrated upon the plaintiff. This will not be so where the act can, without injustice, be undone; and this has been given as a reason why payment of money should not be considered an act of part performance: the money can, in a proper case, be recovered (*p*). Nor will part performance by the defendant entitle the plaintiff to enforce the contract: if the defendant cares to forgo what he has already done that is his loss and no fraud on the plaintiff (*q*).

There can be no doubt that to base the doctrine of part performance on fraud is historically sound; but modern authorities seem to show that in what is the commonest kind of part performance, *viz.*, change of possession of land, the element of fraud has become entirely unimportant. Thus in *Brough v. Nettleton* (*r*) the plaintiff had entered into possession of land under an agreement for a lease with an option to purchase. In due time the plaintiff purported to exercise the option. It was held by P. O. Lawrence, J., that there was sufficient part performance to take the case out of the Statute of Frauds. Nevertheless it is exceedingly difficult to see how, had the defence of the statute prevailed, the plaintiff would have suffered any loss or detriment other than the loss of his contract. The fraud against which the doctrine of part performance is in

(*p*) *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22; see Fry, *Specific Performance* (6th ed.), p. 290, s. 614. Cf. p. 189, *post*.

(*q*) *Grant, M.R.*, in *Buckmaster v. Harrop* (1802), 7 Ves. 341, 346; 82 E. R. 139, 141.

(*r*) [1921] 2 Ch. 25.

general intended to guard, however, is not the act of the defendant in causing the plaintiff to lose the benefit of his contract (s), but in depriving the plaintiff of the benefit of his acts of part performance. Nothing of this sort was present in *Brough v. Nettleton* (t).

Preparatory Acts. Acts not done in performance of the contract but simply in preparation for performance, such as instructing a solicitor to prepare a lease or conveyance to be granted or made pursuant to an oral contract, do not fall within the doctrine (u). This, indeed, has been carried so far that the performance of conditions precedent which are not at the same time undertakings has been held not to be such a part performance as to satisfy the doctrine. Thus in *O'Reilly v. Thompson* (x) the plaintiff agreed with the defendant that upon the plaintiff's obtaining a release of a right from a third party, the defendant would convey certain lands to the plaintiff. The plaintiff duly procured the release by the payment of a valuable consideration; but the Court of Exchequer held that this was no act of part performance, but merely a preparatory act on the plaintiff's part.

Acts Must Be Unequivocal. It is not enough, however, that the act relied upon by the plaintiff should be in performance of an undertaking of the contract and not a mere act of preparation for such performance, and that it should satisfy the requirements as to fraud or be the delivery or acceptance of the possession of land. Courts of equity, while dispensing with compliance with the statutory requirements, have nevertheless been influenced by the statutory policy to the extent of insisting that there should be some evidence of the contract beyond mere oral evidence as to its terms. Equity declines to act on words, unless the words are confirmed and illuminated by deeds. Accordingly it has been laid down that (in the words of Lord Selborne, L.C. (y)) : " All the

(s) The mere loss of the contract is not " injustice of a kind which the statute cannot be thought to have had in contemplation ", to use Lord Selborne's words (quoted p. 186, *ante*). In such a case " The detriment to the plaintiff arises from the folly of acting without a written contract " (Eyre, C.B., in *O'Reilly v. Thompson* (1791), 2 Cox 273; 30 E. R. 127). Cf. *Wood v. Midgley* (1854), 5 De G. M. & G. 41, 45; 43 E. R. 784, 786.

(t) See also *Ungley v. Ungley* (1876), 4 Ch. D. 73, 76, where Malins, V.-C., said that the taking of possession of land, " if it be for an hour only ", is sufficient part performance.

(u) *Cooke v. Tombs* (1794), 2 Anst. 420; 145 E. R. 922; *Whitchurch v. Bevis* (1786, 1789), 2 Bro. C. C. 559; 29 E. R. 306.

(x) (1791), 2 Cox 271; 30 E. R. 126.

(y) *Maddison v. Alderson* (1883), 8 App. Cas. 467, 479.

authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged". What is done must alone and without the aid of words of promise be unintelligible or at least extraordinary unless the parties had made some such a contract as that set up. What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done (z).

The leading authority on this aspect of the doctrine is *Maddison v. Alderson* (a). There the appellant alleged that she had entered into a contract with her late master to continue in his employment as his housekeeper without payment in consideration of his promising to leave her certain property by will. The act of part performance relied upon was the appellant's continuing to serve the deceased. The House of Lords held that this was no sufficient part performance to overcome the lack of a signed writing. While it was consistent with the contract alleged, it was not necessarily referable to any such contract. Continuance in another's employment does not unequivocally relate to or indicate a contract affecting the employer's land (b).

It is sometimes said that the real reason why payment of money is not to be regarded as part performance is that it is an act of an equivocal nature, not necessarily referable to a contract relating to any particular subject-matter (c).

The requirements as to fraud and as to conduct unequivocally pointing to some such contract as that alleged are commonly satisfied by the same acts, which must, in that case, be the acts of the plaintiff done in performance of the obligations of the contract. The requirement of conduct unequivocally referable to some such contract as that alleged may, however, be satisfied by acts of the plaintiff other than those satisfying the requirement as to fraud; by acts not done in performance of an obligation under the contract; and by acts of the defendant (d).

Limits of Doctrine. The precise limits of the doctrine of part performance are a matter of some uncertainty. It is certain,

(z) Cardozo, J., in *Burns v. McCormick* (1922), 233 N. Y. 230, 232-5.

(a) *Cit. sup.*

(b) See especially Lord O'Hagan's judgment, p. 485-6.

(c) Lord Selborne, L.C., in *Maddison v. Alderson*, at p. 478; see p. 187, *ante*.

(d) *Dickinson v. Barrow*, [1904] 2 Ch. 339; see also *Caton v. Caton* (1866), L. R. 1 Ch. 137, 148; *Nunn v. Fabian* (1865), L. R. 1 Ch. 35, 40; *Rawlinson v. Ames* [1925] Ch. 96; *Hohler v. Aston*, [1920] 2 Ch. 420; and *Broughton v. Snook*, [1938] Ch. 505.

however, that the doctrine does not apply where, even if there were a signed writing, a Court of equity would still not entertain a suit in respect of the contract (e). It has, indeed, been suggested by a learned writer that this is the only limitation on the application of the doctrine (f), but there is no decided case taking the doctrine so far (g). A second view is that the doctrine applies only to contracts relating to land (h). It is certainly true that nearly all the reported cases in which the doctrine has been applied have been cases concerning land. Nevertheless the weight of authority is against restricting the doctrine to this extent (i). The opinion best supported by the authorities is that the doctrine can apply wherever the contract is such that a Court of equity would have decreed specific performance of it if it had been properly supported by writing. This is the conclusion reached by Kay, J., in *McManus v. Cooke* (i), after an exhaustive investigation of the question.

§ 70. Quasi-Contractual Remedies in Respect of Contracts Not Complying with the Statutory Requirements

Where one party has performed his side of the contract in whole or in part and the other party, by pleading non-compliance with the statutory requirements, refuses to perform the obligation which the contract places on him, the first-mentioned party is not necessarily without a remedy but may often recover quasi-contractually. Thus where the plaintiff has expended money under the contract (otherwise than by paying it to the defendant) he may be entitled to recover the amount as money paid to the use and at the request of the defendant (k). If the money was paid to the defendant it may often be recoverable as money had and received by him to the plaintiff's use (l). If the plaintiff has rendered services under the contract and the defendant now seeks to evade liability by relying on the absence of a writing the plaintiff will nevertheless be able

(e) *Britan v. Rossiter* (1879), 11 Q. B. D. 123.

(f) Fry, *Specific Performance* (6th ed.), p. 283, S. 593.

(g) In *Williamson v. Lukey* (1931), 45 C. L. R. 282, before the High Court of Australia, the question was discussed whether the doctrine could apply in a suit for an injunction. Starke, Dixon (in whose judgment Cavan Duffy, C.J., concurred) and McTiernan, J.J., while not expressing concluded opinions saw considerable difficulty in applying the doctrine in such a case. Evatt, J., thought that such an application of the doctrine would be an unwarranted extension of it.

(h) *Britan v. Rossiter*, *cit. sup.*

(i) (1887), 35 Ch. D. 681, 697; see also *Lavery v. Pursell* (1888), 39 Ch. D. 508, 518; *Elliott v. Roberts* (1912), 28 T. L. R. 436, 437; and *Crowley v. O'Sullivan*, [1900] 2 Ir. R. 478.

(k) *Knowlmann v. Bluett* (1874), L. R. 9 Ex. 307.

(l) See *Thomas v. Brown* (1876), 1 Q. B. D. 714, *per* Mellor, J., 722-3; *per* Quain, J., 723; *Jones v. Jones* (1840), 6 M. & W. 84, 88; 151 E. R. 331, 333.

to recover the reasonable value of those services on a *quantum meruit* (m).

The remedy of suing on an account stated may sometimes be invoked to avoid the consequences of non-compliance with the statutory requirements. The term account stated applies to three separate kinds of case : (1) where a claim for payment by one party is admitted by the other to be correct; an action can be brought on the admission; (2) where parties having claims against each other bring them into account and strike a balance; the party against whom the balance stands becomes liable to pay the amount; (3) where one party makes a claim against another and that other for valuable consideration accepts it as correct (n). Whether all or any of these forms of account stated are genuinely quasi-contractual is a question into which we need not enter (o); but all of them may, in appropriate circumstances, be utilised to overcome the lack of the statutory formalities. It is no answer to a claim on an account stated of the second or third sorts that all or any of the debts brought into account arose out of contracts not complying with the statutory requirements (p). If reliance be placed on an account stated of the first sort, however, it seems necessary that the consideration for the debt forming the basis of it should have been executed (q). In that case it will not matter that the debt originally arose out of a contract unenforceable by reason of one or other of the statutes (r).

(m) *Snelling v. Huntingfield* (1834), 1 C. M. & R. 20, 25; 119 E. R. 976, 978; *Souch v. Strawbridge* (1846), 2 C. B. 808; 135 E. R. 1161; *Britain v. Rossiter* (1879), 11 Q. B. D. 123, 133; *Scott v. Pattison*, [1923] 2 K. B. 723.

(n) *Cantillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134, *per* Viscount Cave, 143; *Siqueira v. Noronha*, [1934] A. C. 332.

(o) See Winfield, *Province of the Law of Tort*, 167 ff.

(p) *Laycock v. Pickles* (1863), 4 B. & S. 497; 122 E. R. 546.

(q) *Falmouth v. Thomas* (1832), 1 C. & M. 89; 149 E. R. 326; see *per* Scrutton, L.J., in *Joseph Evans & Co. v. Heathcote*, [1918] 1 K. B. 418, 437.

(r) *Cocking v. Ward* (1815), 1 C. B. 858; 135 E. R. 781.

CHAPTER IX

CERTAINTY OF DECLARATION OF THE
CONTRACTUAL WILL

§ 71. The General Principle Stated

Part of our definition of a contract was that it was a declaration of will, or a combination of such declarations defining an obligation or obligations. But a person's will in respect of a particular matter may be more or less precise; and even though his will in the matter may be quite precise he may declare it more or less precisely. What measure of precision must a declaration of will exhibit before it may have contractual efficacy? In other words, with what degree of precision must a declaration describe an obligation in order that it may be said to define it? In a general way the answer is that the declaration must describe the obligation with such particularity as to disclose with reasonable certainty what the party to be bound is by virtue of it required to do and upon what conditions (a). It must be sufficiently certain to enable the Court to give it a practical meaning (b). An alleged contract which does not define with at least this measure of precision the obligation or obligations which it purports to create will be void for uncertainty.

There are some well-known cases which illustrate this principle. In *Guthing v. Lynn* (c) the defendant sold the plaintiff a horse for £63, the plaintiff promising that "if the horse was lucky to him he was to give £5 more or the buying of another horse". This was held by the Court of King's Bench to be too uncertain to be a contract. "Supposing it to be ascertainable", said Parke, B., "under what circumstances the horse would prove lucky, still the undertaking to be performed in that event is incapable of being reduced to such certainty as to form matter of legal obligation."

(a) "In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties." Lord Tenterden, C.J., in *Coles v. Hulme* (1828), 8 B. & C. 568, 579; 108 E. R. 1153, 1155. "In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty." Viscount Maugham in *Scammell v. Ouston*, [1941] A. C. 251, 255.

(b) Lord Wright, *ib.*, at p. 268-9.

(c) (1831), 2 B. & Ad. 232; 109 E. R. 1130.

So in *Montreal Gas Co. v. Vasey* (d), the Privy Council held that a promise that "if we are satisfied with you as a customer we would favourably consider an application from you" for the renewal of a contract could not itself be a contract.

Nevertheless the Courts are reluctant to hold a transaction void merely on the ground of uncertainty and will strive to escape this result if possible (e). Thus in *Armstrong Taylor & Co. v. Oldham Corporation* (f) Barbrook, one of the Corporation's officers, was being sued in respect of an act performed by him in his official capacity, and the corporation undertook "to assist Mr. Barbrook in paying or contributing to his costs in defending the action". It was contended that this was too vague to be a contract, but Hawke, J., although saying that "It is a difficult thing to construe", nevertheless upheld it.

§ 72. Contract Ex Facie Uncertain May Sometimes Be Saved

A contract which *ex facie* lacks sufficient certainty may sometimes be saved on the principle *id certum est quod certum reddi potest*. Thus a contract may provide that one of its terms is to be as settled by a third party; and if the third party duly settles that term the contract will be good (g). "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. . . . Therefore you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else" (h).

(d) [1900] A. C. 595.

(e) Cf. *Doe d. Winter v. Perratt* (1843), 6 Man. & G. 314, 362; 134 E. R. 914, 933, *per* Lord Brougham. In *Scammell v. Ouston* (*supra*), at p. 268, Lord Wright remarked: "The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted."

(f) [1937] 2 A. E. R. 577.

(g) *Thursby v. Warren* (1629), Cro. Car. 159; 79 E. R. 738; *Foster v. Wheeler* (1888), 38 Ch. D. 130; s. 9, Sale of Goods Act, 1893.

(h) Viscount Dunedin in *May and Butcher v. The King*, [1934] 2 K. B. 17, 21. Later in his speech Lord Dunedin said, "with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer". This, it is submitted, is irreconcilable with the authorities considered on p. 194, *post*, and must be regarded as having been said *per incuriam*. Cf. *Foster v. Wheeler*, *supra*.

So an apparent uncertainty arising through the contract specifying an obligation in alternative forms may be cured by the election of one of the parties. Where the contract does not state which of the parties is to have the right to elect, that party has it who has to do the first act in performance or preparation for the performance of the obligation (i). If the election is with the promisor and, at a time when he still has the right to elect, he fails to carry out his obligation in any of the permissible forms damages will be assessed against him on the basis of the least expensive alternative (k). If, however, the contract goes so far as to leave entirely to the promisor's discretion the extent of his performance, the contract will be void for uncertainty. As was said by Vaughan Williams, L.J., in *Loftus v. Roberts* (l): "wherever words which by themselves constituted a promise were accompanied by words which showed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In Leake on Contracts, 3rd ed., p. 3, it was expressed thus: 'Promissory expressions reserving an option as to the performance do not create a contract'." Thus a promise to pay "such remuneration as shall be deemed right" was held not to constitute a contract (m). So where the plaintiff stipulated for what "you may think me deserving of and your means can afford" and the defendant replied "it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labour done", and on this basis the plaintiff rendered certain services, he was unable to sue in respect of what he had done (n).

Again, an apparent uncertainty may disappear when the contract is considered in the light of such evidence as is properly given to explain it (o). In particular a contract to sell at a reasonable price, or to do something within a reasonable time, or otherwise on reasonable terms is not void for uncertainty, for what is reasonable

(i) *Layton v. Pearce* (1778), 1 Doug. K. B. 15; 99 E. R. 12; *Reed v. Kilburn Co-operative Society* (1875), L. R. 10 Q. B. 264.

(k) *Abrahams v. Herbert Reisch, Ltd.*, [1922] 1 K. B. 477.

(l) (1902), 18 T. L. R. 532, 534.

(m) *Taylor v. Brewer* (1813), 1 M. & S. 290; 105 E. R. 108.

(n) *Roberts v. Smith* (1859), 4 H. & N. 316; 157 E. R. 861. In view of this case and the decision of the Court of Appeal in *Loftus v. Roberts* (1903), 18 T. L. R. 532, the dissenting judgment of Parke, B., in *Bryant v. Flight* (1839), 5 M. & W. 114; 151 E. R. 49, must be preferred to the judgment of the majority of the Court of Exchequer in that case.

(o) As to the admission of such evidence see *per* Lord Wright in *I. R. C. v. Raphael*, [1935] A. C. 96, 142-3, and p. 148, *ante*.

is either a question of law, or more often a question of fact which can be established by evidence (*p*). "It is perfectly true that in many contracts where you want a measure to be applied to a particular subject-matter, you leave the measure to be supplied by reason. There is many a contract, for example, which, instead of fixing the particular time for payment, provides that the time is to be fixed by what is reasonable in the trade or in the business. In those cases you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends towards certainty, and therefore enables you to make up for the absence of distinctness on the part of the contract by reference to a standard which the parties had in their minds, though they did not express it on paper, namely, the standard of reason" (*q*). So in *Broome v. Speak* (*r*) Buckley, J., held that a promise that the plaintiff's "right to recover proper remuneration for commission on introducing the business should be honourably met" was not too uncertain to be a contract.

§ 73. Contract to Make a Contract: Forward Contracts

One application of the principle as to reasonable certainty appears in the rule that a contract to make a contract some terms of which are to be agreed upon by the parties in the future is void. "It has long been a well-recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in future agree upon a matter which is vital to the arrangement between them and has not yet been determined" (*s*). Thus in *Loftus v. Roberts* (*t*) it was held by the Court of Appeal that an agreement with an actress by which she was to be engaged "at a

(*p*) Taylor, *Evidence* (12th ed.), pp. 33 ff.; *Ellis v. Thompson* (1838), 3 M. & W. 445; 150 E. R. 1219; *Hick v. Raymond*, [1893] A. C. 22, 29; *Sale of Goods Act*, 1893, ss. 8 (2), 29 (2) and (4), 56.

In the same way, the adjective "usual" may sometimes introduce a sufficient degree of certainty: *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading and Industrial Co., Ltd.*, [1944] K. B. 12, 16.

(*q*) Bowen, L.J., in *Davies v. Davies* (1887), 36 Ch. D. 359, 392

(*r*) [1903] 1 Ch. 586, 599-600, distinguishing *Taylor v. Brewer*, *Roberts v. Smith*, and *Loftus v. Roberts*, *cit. sup.*

(*s*) Lord Buckmaster in *May and Butcher, Ltd. v. The King*, [1934] 2 K. B. 17, 20.

(*t*) (1902), 18 T. L. R. 532.

West-end salary, to be mutually arranged between " her and the other party did not constitute a contract.

The rule indicated in the last preceding paragraph was applied by the House of Lords in *May and Butcher, Ltd. v. The King* (u). The suppliants in that case had entered into an agreement with the Disposals and Liquidation Commission containing, *inter alia*, the following terms : " (1) The Commission agrees to sell and [the suppliants] agree to purchase the total stock of old tentage. . . . (3) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission. (4) Delivery . . . shall be taken by the purchasers in such period or periods as may be agreed upon between the Commission and the purchasers when such quantities of old tentage are offered to the purchasers by the Commission." This agreement was unanimously held by the House of Lords (Lord Buckmaster, Viscount Dunedin and Lord Warrington of Clyffe) to be merely an agreement to enter into a contract on terms to be agreed upon in the future, and hence not itself a contract.

In view of this decision it appeared for a time as though an important class of commercial contracts known as forward contracts, *i.e.*, contracts for the future supply of some commodity at a price and on terms to be arranged, had been reduced to the level of engagements of a merely honorary character in no way binding in law. This, at least, seems to have been the opinion of the Court of Appeal (Scrutton, Greer and Romer, L.JJ.), for when such a contract came before them in *Hillas v. Arcos* (x) they unanimously held that since *May and Butcher v. The King* it could not be supported. In *Hillas v. Arcos* the parties had entered into an agreement commencing " Heads for the Purchase of Russian Goods " and being in part as follows : " We agree to buy 22,000 standards of Softwood Goods of fair specification over the season 1930 under the following conditions : . . . (9) Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, the buyers shall obtain the goods on conditions and at prices which show to them a reduc-

(u) [1934] 2 K. B. 17, 20.

(x) (1931), 36 Comm Cas. 353.

tion of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before January 1, 1931". The Court of Appeal held that clause (9) purporting to give the buyers an option to enter into a further contract was too uncertain to have any contractual effect. "Relations between business people", said Greer, L.J. (y), "frequently arise in which it is impossible to finally settle the respective rights of buyer and seller until some further contract has been made. In such cases the parties must inevitably trust to the honour of those with whom they deal to give effect to honourable obligations." Scrutton, L.J., lamented (z) "that in many commercial matters the English law and the practice of commercial men are getting wider apart. . . . The commercial man does not think that there can be no contract to make a contract when every day he finds a policy 'premium to be agreed' treated by the law as a contract".

When *Hillas v. Arcos* went to the House of Lords (a), however, the House (Lords Tomlin, Warrington of Clyffe, Thankerton, Macmillan and Wright) unanimously reversed the decision of the Court of Appeal. *May and Butcher v. The King*, it appeared, was merely a decision as to the construction of a particular contract, and not an authority on the construction of other contracts in similar but not identical terms. No doubt was thrown on the rule that an agreement to enter into a contract upon terms to be agreed upon in the future is void for uncertainty; but in any particular case it is a question of construction whether that is the true meaning of the agreement. *Prima facie* a commercial contract leaving particular matters unspecified is not to be construed as involving the making of a further agreement as to the unspecified matters, but any such gaps are to be supplied by the implication of reasonable terms. "But it is clear", said Lord Wright (b), "that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle

(y) At p. 375.

(z) At p. 368.

(a) (1932), 38 Comm. Cas. 23.

(b) At p. 36.

in finding defects; but on the contrary, the Court should seek to apply the old maxim of English law, *Verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain." In a later passage in his judgment (c) Lord Wright pointed out that even though essential terms in a commercial contract may not be precisely determined it is nevertheless wrong to deduce as a matter of law that they must therefore be determined by a subsequent contract: this is to ignore, "as it seems to me, the legal implication in contracts of what is reasonable, which runs throughout the whole of the modern law in relation to business contracts".

The result achieved by the House of Lords in *Hillas v. Arcos* is satisfactory; and no doubt that decision and not the decision in *May and Butcher, Ltd. v. The King* will be regarded for the future as affording guidance in the construction of forward contracts and mercantile contracts of a similar nature. Nevertheless it is not easy to discover any well-marked differences between the facts in these two cases; and in *Foley v. Classique Coaches, Ltd.* (d) the Court of Appeal was scarcely successful in its search for such differences. Despite the difficulty of distinguishing *May and Butcher, Ltd. v. The King*, however, the Court was guided by *Hillas v. Arcos*, and upheld a contract for the purchase by the defendants from the plaintiff of all the petrol required by the defendants for the running of their business of motor coach proprietors, "at a price to be agreed by the parties in writing and from time to time" (e).

(c) At p. 43

(d) [1934] 2 K. B. 1.

(e) For further illustrations of the implication of reasonable terms to save a commercial contract from failing for uncertainty see *Abrahams v. Reiach*, [1922] 1 K. B. 477, *Re Brand Estates, Ltd.* [1936] 3 A. E. R. 374; *Cameron v. Prendergast*, [1940] A. C. 549, *per* Lord Wright, 562. In *Ouston v. Scammell*, [1940] 1 A. E. R. 59, the Court of Appeal upheld a contract for the acquisition of a motor lorry "on hire-purchase terms", the terms, except for the price and rebate in respect of an old lorry traded in, not being otherwise defined, but this

§ 74. Agreements Providing for the Subsequent Preparation of a Contract

The problem of uncertainty is sometimes presented by agreements in which the parties contemplate the subsequent preparation and execution of a contract. In such cases the reference to the subsequent contract may be "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through" (f), and if so it will not prevent the agreement in which it occurs from itself constituting a contract.

On the other hand the subsequent contract referred to may on the true construction of the agreement mean a contract which may contain terms not already agreed upon or differing from those already agreed upon. In such a case the agreement will be void for uncertainty. Thus, in *Winn v. Bull* (g) the defendant agreed in writing with the plaintiff to take a lease of a house for a certain term and at a certain rent, "subject to the preparation and approval of a formal contract". Jessel, M.R., held that this writing did not disclose a concluded contract. "Now in the present case", he remarked, "the plaintiff says in effect, 'I agree to grant you a lease on certain terms, but subject to something else being approved'. He does not say, 'Nothing more shall be required beyond what I have already mentioned', but 'something else is required', which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained."

Even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, however, it may nevertheless appear that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it. In this case the agreement will be no contract because of the absence of any *animus contrahendi* (h). Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition this will almost invariably be conclusive that the agreement itself was not intended to be a contract (i). The

decision was reversed in the House of Lords: *Scammell v. Ouston*, [1941] A. C. 251. See also *Bishop and Baxter, Ltd. v. Anglo-Eastern Trading and Industrial Co., Ltd.*, [1944] K. B. 12.

(f) *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, 289.

(g) (1877), 7 Ch. D. 29, 31.

(h) See p. 21, ante.

(i) *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 289.

position in such a case is thus stated by Sargant, L.J., in *Chillingworth v. Esche* (k): "To my mind the words 'subject to contract' or 'subject to formal contract' have by this time acquired a definite ascertained legal meaning—not quite so definite a meaning perhaps as such expressions as f.o.b. or c.i.f. in mercantile transactions, but approaching that degree of definiteness. . . . I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract. But they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear *prima facie* meaning to be displaced" (l).

(k) [1924] 1 Ch. 97, 114. See also *Spottiswoode, Ballantyne & Co., Ltd. v Doreen Appliances, Ltd.*, [1942] 2 K. B. 32.

(l) Cf. *Caney v. Leith*, [1937] 2 A. E. R. 532, where Farwell, J., had to consider, in regard to an agreement for the assignment of a lease, the effect of the words "subject to the purchaser's solicitor approving the lease".

PART III

THE INITIAL INVALIDITY OF CONTRACTS

A contract which complies or appears to comply with the requirements for the making of a contract stated in Part II hereof will be *ex facie* valid. Nevertheless such a contract, if an instrument, may not in truth accurately declare the will of the party or parties whose declared will it purports to be. The Courts will sometimes correct or rectify such an error and to this extent the contract, in its unrectified form, will be invalid. This topic of rectification will be considered by us as part of the larger topic of mistake or error. Moreover a contract which is *ex facie* valid may nevertheless be void or voidable either because of some circumstance going to the effect or quality of the assent or consent involved in the contract or because the law for some other reason considers that such a contract or such or any contract by such a party or parties should be wholly or partially denied the efficacy of a fully valid contract.

Circumstances Affecting the Validity of Assent or Consent. In the first place, where the contract depends on agreement, the apparent correspondence of offer and acceptance may be shown to be illusory and the fact to be that the parties were not agreed because one was mistaken as to the meaning of the other. We must therefore consider the operation of such mistake or error in preventing the formation of a valid contract. Secondly, although there may be no question of mistake or error operating to produce such latent disagreement, the assent or consent of the party or parties may have been given under the influence of some erroneous assumption or misapprehension as to the subject-matter of the contract, and this error may have been caused by the misrepresentation, innocent or fraudulent, of the other party, or not so caused. We must therefore consider the effect of this kind of error on the validity of a contract, and also whether its operation in this regard is affected by its having been fraudulently or innocently induced by the other party. Thirdly, the assent or consent may have been induced by non-disclosure of facts relating to the subject-matter of the contract or by undue influence, and these topics also demand discussion. Fourthly, one or both parties may not have

had the requisite mentality to give an assent or consent which should be allowed to have the efficacy and operation normally attaching to assent or consent. Such cases constitute one aspect of the topic of the incapacity of parties.

Other Circumstances Affecting the Initial Validity of a Contract.

A contract may also be invalid because one or both parties, while (if a natural person or persons) of sufficient natural capacity to contract, is or are for reasons of policy wholly or partially incapacitated by the law from so doing. This constitutes the other aspect of the topic of the incapacity of parties. We shall discuss this topic in its turn. Finally a contract may be wholly or partially invalid because it is affected by illegality, or although not affected by illegality, is of such a nature that the law thinks it should be merely honorary in its obligation. Such cases we shall consider under the head of illegal and nugatory contracts.

Because all these various grounds of contractual invalidity arise out of circumstances existing at the time when the contract is made, they may be brought together under the general head of the Initial Invalidity of Contracts. They are to be contrasted with grounds of invalidity arising after the making of the contract. Such grounds of *ex post facto* invalidity we shall consider at a later stage under the general head of Dissolution of Contracts.

CHAPTER X

ERROR

§ 75. Three Kinds of Error—In Verbis, In Consensu, In Causa

The kinds of error or mistake by which the validity or operation of a contract may be affected are three in number. The first is error in the expression of the contract; the second is error as to the nature or contents of it; while the third is error as to the facts which have induced the making of it.

In the first case there has been a genuine assent to particular terms, but a mistake has been made in the expression of them. One thing has been meant by the party or parties concerned, but by accident something different has been said; as when a contract for the sale of a certain section of land has been reduced to writing, and by a clerical error the section has been wrongly numbered or

described, so that the written instrument so signed by the parties appears on the face of it to be the sale of one piece of land, whereas the true contract actually agreed upon was for the sale of another piece. This kind of mistake may be distinguished as *error in verbis*.

The second case is that of error as to the nature or terms of the contract. One party has meant to agree to one thing, while the other party has meant to agree to a different thing. Although there may be in appearance a true contract, and although each of the parties may have thought that he had made such a contract, there is in reality an absence of that mutual consent that is essential to the existence of a real and valid agreement. The parties have not meant or intended the same thing in the same sense, and therefore have never in truth agreed together upon anything. In the technical language of the law the parties are not *ad idem*. Error of this kind may be distinguished as *error in consensu*.

The third and last kind of mistake is that which relates not to the expression of the contract (*error in verbis*) or to the nature and terms of it (*error in consensu*), but to the facts that have served as the inducement, occasion, reason, or cause operative upon the mind of one or both of the parties in leading him or them to enter into the contract. A buyer may be under some mistake as to the nature, quality, or value of the article purchased by him, and this mistake may have been the inducing cause which led him to make a contract which he would not otherwise have entered into. He may have bought a worthless stone which he believed to be a diamond, or a horse which he believed to be sound though it was unsound, being misled either by the representations, fraudulent or innocent, of the seller or of some third person, or by following his own fallacious opinion without any such representation at all. An error of this description may or may not be common to both of the parties; it may be either bilateral or unilateral. It is essentially distinct in its nature from the other two forms of error. It is not *error in verbis*, for the parties have correctly expressed the bargain made between them; nor is it *error in consensu*, because both of them have agreed to the same contract and the same terms. It is *error in causa*, relating, that is to say, not to the expression or to the terms of the contract, but to the reason, inducement, or cause of the making of it.

We proceed to deal more particularly with each kind of error in its order.

§ 76. Mistake in the Expression of a Contract: Rectification

Error in the expression of a contract calls for consideration only in the case of those contracts which are reduced to the form of a written instrument. In the case of a contract by word of mouth a mere *lapsus linguæ*, understood by both parties to be so, is of no legal significance; their contract is that which they have actually agreed upon, irrespective of the imperfect expression of it. But in the case of written contracts an error of this description is of some importance. By a rule of the common law already mentioned (a) a written instrument constituting a contract is conclusive evidence of the terms of the contract. It cannot, by evidence *aliunde* as to what the true intention or agreement was, be derogated from, supplemented or contradicted. Verbal evidence is inferior to written evidence and cannot prevail over it. Error or no error, *littera scripta manet*. At common law, therefore, the plea of *error in verbis* is not admissible in an action for the enforcement of a written contract, except, indeed, in those cases where the error is so far apparent on the face of the instrument that it may be corrected as a matter of mere interpretation without evidence *aliunde* of the intention of the party or parties (b).

The rigidity and hardship of this rule of the common law has, however, been departed from in equity. The rectification of written instruments, including contracts, in respect of *error in verbis*, became an established part of the equitable jurisdiction of the Court of Chancery—that is to say, the party or either of the parties whose will or concurring wills the instrument purported to declare could, if the declaration were erroneous, institute a suit in Chancery for the correction of it by the decree of that Court (c). At the present day, since the fusion of law and equity, the rule of the common law as to the conclusiveness of a written instrument, and the rule of equity that a written instrument can be corrected for error in a suit

(a) See p. 145, *ante*.

(b) *Burchell v. Clark* (1876), 2 C. P. D. 88; especially *per* Amplett, J.A., 97-8; *Mourmand v. Le Clair*, [1903] 2 K. B. 216. Cf. p. 205, n. (f), *post*.

(c) *Henkle v. Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317, 318; 27 E. R. 1055; *Shipley U. D. C. v. Bradford Corporation*, [1936] Ch. 375, followed in *Crane v. Hegeman-Harris Co. Inc.*, [1939] 1 A. E. R. 662, 664, which was affirmed in the Court of Appeal, [1939] 4 A. E. R. 68. In *Inland Revenue Commissioners v. Raphael*, [1935] A. C. 96, 143, Lord Wright, after referring to the rule of the common law, said: "If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention; these matters may be established, as they generally are, by extrinsic evidence".

expressly instituted for that purpose, stand side by side and are administered concurrently in a single jurisdiction (d). A party to a written instrument is still conclusively bound by the words of it as they stand, however erroneous, so long as they do stand (e); but he is at liberty to sue for the rectification of the instrument, and this remedy is available to him even by way of counterclaim in an action brought by the other party for the enforcement of the erroneous instrument as it stands.

Inasmuch as the basis of rectification is the discordance between the will or concurring wills of the party or parties and the contractual instrument and inasmuch also as an instrument is a writing purporting to declare the will of the party or parties at the time of its execution, it follows that an applicant for rectification must prove (f) the existence at that time (g) of a contractual intention in the sense which the instrument would bear if rectified. If the instrument as rectified would amount to a deed based on the unilateral intention of the covenantor alone, then the terms of that unilateral intention will require to be established; if it would constitute a contract based on agreement then proof of the fact of such an agreement and the terms thereof would be necessary (h).

It has sometimes been maintained that rectification of a contractual instrument may only be had where it is possible to prove that before the execution of the erroneous instrument there was in existence a legally enforceable contract. Although, however, it would be essential to prove the existence of such a contract in a suit claiming specific performance, such proof would, on principle, seem quite unnecessary where the plaintiff's claim is simply to have

(d) Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 56.

(e) *Re Malet* (1862), 30 Beav. 407; 54 E. R. 947; see also *Blay v. Pollard and Morris*, [1930] 1 K. B. 628.

(f) The Court has jurisdiction to rectify an instrument on evidence afforded simply by a perusal of it: *Banks v. Ripley*, [1940] 1 Ch. 719.

(g) *Shipley U. D. C. v. Bradford Corporation*, [1936] Ch. 375.

(h) Statements of this principle are often restricted to the case of an agreement "The jurisdiction of Courts of Equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement": per Warrington, L.J., in *Craddock Bros. v. Hunt*, [1923] 2 Ch. 136, 159. "Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified. . . .": per Lord Birkenhead in *United States v. Motor Trucks, Ltd.*, [1924] A. C. 196, 209. Such *dicta* are to be explained, however, by reference to the contracts before the Courts in the particular cases: they were contracts based on agreement; and indeed cases of agreements are much commoner than others. But there can be no doubt that the maker of a deed purporting to declare his unilateral intention will be entitled to sue for rectification if that deed by mistake fails to declare his intention correctly. Cf. *Re Walton's Settlement*, [1922] 2 Ch. 509.

a contractual instrument reformed to declare correctly the intention with which it was executed. This is the conclusion at which Clauson, J., after a very careful survey of the authorities, arrived in *Shipley Urban District Council v. Bradford Corporation* (i), and his reasoning seems demonstrative. As Simonds, J., said in a later case (k), if the law were otherwise, "it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it".

Voluntary covenants, like other contracts, may be rectified for error in *verbis*; but inasmuch as equity will not help a volunteer, such a covenant will be rectified only with the consent of the covenantor. If the covenantor insists on adhering to the deed in its unrectified form, the covenantee must either accept it in that form or renounce it; he cannot compel the covenantor to submit to any modification of it (l).

This equitable jurisdiction in the rectification of erroneous instruments extends even to contracts which are required by statute to be made or proved in writing (m). If an instrument is executed in intended obedience to the statute, but contains *error in verbis* so that it does not truly express the agreement so required to be expressed in writing, a Court exercising equitable jurisdiction may nevertheless rectify the instrument in reliance on verbal testimony as to what the true and common intention of the parties was (n).

Save in Courts which possess this equitable jurisdiction (o), and save in cases where by action or counterclaim the jurisdiction is properly invoked, the rule of the common law stands unaffected, and written instruments are conclusive as to the intention of the parties, whether they are erroneous in *verbis* or not.

§ 77. Error In Consensu: Absence of Consensus ad Idem

We pass now to the consideration of the second kind of mistake—namely, *error in consensu*, a case of more importance and interest in the general law and theory of contractual relationships. The

(i) [1936] Ch. 375.

(k) *Crane v. Hegeman-Harris Co. Inc.*, [1939] 1 A. E. R. 662, 664, affirmed in Court of Appeal, [1939] 4 A. E. R. 68.

(l) See *Phillipson v. Kerry* (1863), 32 Beav. 628; 55 E. R. 247; *Lister v. Hodgson* (1867), L. R. 4 Eq. 30; *Turner v. Collins* (1871), L. R. 7 Ch. 329.

(m) *Re Boulter* (1876), 4 Ch. D. 241.

(n) *United States v. Motor Trucks, Ltd.*, [1924] A. C. 196; *Shipley U. D., C. v. Bradford Corporation*, [1936] Ch. 375.

(o) Cf. *Foster v. Reeves*, [1892] 2 Q. B. 255.

effect of error of this description—namely, a misunderstanding between the parties—is to make the contract wholly void. The parties have not intended the same thing, and therefore they have not agreed to anything, and therefore there is no contract at all. The invalidating effect of *error in consensu* is really an application to latent circumstances of the principle that an offer can be converted into an agreement only by an acceptance which conforms accurately to the terms of that offer (p).

It is immaterial in this respect whether the error is produced by the fraud or misrepresentation of one of the parties to the contract or is produced in any other manner. In ordinary circumstances fraud produces merely *error in causa*; its only effect is to induce the other party to enter by mistake into a contract that he would not otherwise have made; and in such a case the contract, being a true agreement based on actual consent to its terms, is not void, but is merely voidable at the option of the party deceived. But where, as sometimes happens, the fraud of one party has the effect of producing *error in consensu* so as to prevent the existence of any real consent at all the contract is not merely voidable, but is wholly void *ab initio*. This is so, for example, when the fraud consists in personation, leading A to believe that he is contracting with B, when he is really dealing with C (q). In such a case there is no contract at all: none between A and B, for B had not in truth any connection with the transaction; and none between A and C, because A did not intend to contract with C.

Error in consensu is of two kinds, for the misunderstanding may relate either to the terms of the contract or to the identity of the parties. A man may make a contract either under a mistake as to the matter agreed upon, or under a mistake as to the person with whom he is dealing. In neither case is there any genuine contract. In the first case there is no *consensus* as to the nature of the obligations to be constituted, and in the second case there is no *consensus* as to the persons between whom those obligations are to exist. Although both these cases are governed by essentially the same considerations, they are so far distinguishable in their nature that it is convenient to consider and illustrate them separately. And first of mistake as to the terms of the contract (r). This may be illustrated by the following examples: In *Raffles v.*

(p) See p. 79, *ante*.

(q) See S. 84, pp. 225 *et seq.*, *post*.

(r) Mistake as to the identity of parties is considered in S. 84, pp. 225 *et seq.*, *post*.

Wichelhaus (s) a written contract was made for the sale of a cargo of cotton "to arrive ex 'Peerless' from Bombay". There were in fact two ships sailing from Bombay about the same time, both of which were named the "Peerless". The seller meant one of those ships, and the buyer meant the other. The apparent contract, therefore, was not a real contract, for underlying the words of the agreement there was not that true *consensus ad idem* which is essential. There was no contract for the sale of the cargo on the "Peerless" which first left Bombay; for, although the seller intended to sell this cargo, the buyer did not intend to buy it; nor was there any contract to sell the cargo in the second ship, because, although the buyer intended to buy it, the seller did not intend to sell it. In *Henkel v. Pape* (t) the error arose from the mutilation of a telegraphic message. The defendant sent a telegram to the plaintiff ordering "three rifles". By a mistake in the telegraph office the order received by the plaintiff was for "the rifles", and was understood by the plaintiff, in consequence of previous negotiations between the parties, as an order for fifty rifles, which the plaintiff despatched to the defendant accordingly. It was held that the defendant was not bound to accept them. In *Falck v. Williams* (u) the mistake arose through the misinterpretation of a telegraphic communication in code. The code message was ambiguous, and was intended in one sense by the recipients and in a different sense by the senders. It was held that there was no contract at all, either in the one sense or in the other.

§ 78. Contract Valid by Estoppel Notwithstanding Error in Consensu

The principle established by such cases is subject to a very important qualification. It does not entitle a party to the contract to allege that he meant something different from what he said; it merely entitles him to allege that he meant something different from what was meant by the other party. What he meant is to be ascertained conclusively by reference to what he said, if what he said was unambiguous and was understood by the other party in its proper sense. In *Smith v. Hughes* (x) it is said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed

(s) (1864), 2 H. & C. 906, 159 E. R. 375.

(t) (1870), L. R. 6 Ex. 7.

(u) [1900] A. C. 176.

(x) (1871), L. R. 6 Q. B., at p. 607.

by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms". Any party who thus misleads the other party by saying mistakenly what he does not really mean is nevertheless bound by his words. He is taken to mean what the other party honestly understood him to mean by the words used by him, otherwise there would be no security in the making of contracts. Thus in the case of *Henkel v. Pape*, already cited, if the mistake of writing "the rifles" instead of "three rifles" had been made by the buyer himself or by his servant, instead of by the telegraph office, he would not have been permitted to plead that although he said the one thing he really meant the other. In all such cases, although there is in fact and in truth no *consensus ad idem*, the party responsible for the mistake is estopped from saying so, and is bound by the apparent contract as if it were a real one.

But it is otherwise if the other party knows of the mistake. In this case there is no estoppel against the mistaken party; he is not precluded from alleging and relying on his error, for although he has said what he did not mean he has not thereby misled the other party. Thus, in *Hartog v. Colin (y)*, the defendants offered to sell a quantity of skins at a price expressed in pence per pound whereas they intended their offer to be at that number of pence per piece. The plaintiff knew that the defendants were under this misapprehension, and for this reason it was held that the defendants were not precluded from alleging the absence of the *consensus ad idem* which is necessary for a valid contract. If, however, the plaintiff had been ignorant of the mistake the defendant would have been held to his contract, as in *Van Praagh v. Everidge (z)*, where the purchaser bid for and bought at auction one lot of land in mistake for another.

A further exception to the operation of estoppel arises where an effective cause of the error of the mistaken party is the conduct of the other party or his agent. In *Scriven v. Hindley (a)* an auctioneer put up for auction on behalf of the plaintiff certain lots of hemp and tow. The defendant bid for and bought a certain lot under the mistaken belief that the auctioneer was offering hemp,

(y) [1939] 3 A. E. R. 566.

(z) [1902] 2 Ch. 266; reversed on another ground in the Court of Appeal, [1903] 1 Ch. 434. An unfortunate *obiter dictum* which fell from Collins, M.R., in the Court of Appeal is effectively criticised in Williams, *Vendor and Purchaser* (3rd ed.), vol. 2, p. 751.

(a) [1913] 3 K. B. 564.

whereas he was really offering to. The jury found that the form of the catalogue prepared by the auctioneer and the conduct of the auctioneer's foreman in charge of the show-rooms, or one of them, contributed to cause the mistake that occurred. The defendant was accordingly held by A. T. Lawrence, J., entitled to rely on his mistake as a defence to an action for the price. "Such a contract [by estoppel] cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause the mistake."

The estoppel by which a party is thus precluded from disputing that his expressed consent is also his real consent applies *a fortiori* to the case of contracts made in writing. We have already said in relation to *error in verbis* that such a contractual instrument is conclusive, subject only to the equitable jurisdiction to rectify it in respect of any erroneous expression of the actual common intention. The meaning of such an instrument is a matter of law for the Courts. The instrument speaks for itself as to the intention of the parties, and it is for the law to interpret it. Neither party is permitted to contradict the instrument by alleging that in making the contract he meant something different from that which the instrument itself means as so interpreted by law. Any allegation of *error in consensu* is therefore excluded. The parties are conclusively taken to have meant what the written contract means; therefore they must have meant the same thing, and the necessary *consensus ad idem* must have existed. As is stated by Lindley, L.J., in *Wilding v. Sanderson* (b): "A written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed". So in *Stewart v. Kennedy* (c) Lord Watson, using the language of Scots law, but expressing a principle equally applicable to the law of England, says: "in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken, will not be sufficient to give him the right [*i.e.*, of repudiating the contract] unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract. . . . He contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute by the interpretation which a Court of law may put upon the language of the

(b) [1897] 2 Ch., at p. 550.

(c) (1890), 15 App. Cas. 75, 121—123.

instrument. The result of admitting any other principle would be, that no contract in writing could be obligatory if the parties honestly attached, in their own minds, different meanings to any material stipulation."

The rule as to *error in consensu*, therefore—the rule requiring *consensus ad idem* to make a valid contract—does not mean that the parties to a contract in writing must have an accurate and common understanding as to the meaning and effect of the contract as so expressed. Such a contract means for both parties what the law interprets the instrument to mean. It is only when the written instrument so agreed upon as the authentic and conclusive expression of the parties' common intention contains some latent ambiguity not capable of solution by way of legal interpretation of the document itself that any question of *error in consensu* can arise: as it did arise, for example, notwithstanding the existence of a written contract, in *Raffles v. Wichelhaus* (*d*) with respect to the two ships named the "Peerless". The law could not tell by looking at the instrument which of those ships was meant, and as the parties in fact meant different ships there was no *consensus ad idem*. A written instrument can doubtless be set aside for fraudulent misrepresentation by one of the parties as to its legal effect, or may be rectified to give effect to a genuine common intention, but it cannot be set aside as inoperative because of a mere misunderstanding by one of the parties as to its legal meaning and effect.

It is to be observed that the conclusive operation of a written contract extends not merely, as already indicated, to the meaning and effect of the language used therein, but also, subject to two exceptions, to the actual contents of the instrument. Just as a party to a written instrument is not permitted to plead that he did not know what the instrument meant, so, subject to the exceptions indicated, he is not permitted even to plead that he did not know what the instrument said. In the ordinary case (*e*), if he chooses to sign the instrument he is bound by it and by all its terms, even though it contains provisions whose meaning he misunderstood or of whose presence in the instrument he was unaware (*f*). As against the other party to the contract who was unaware of any

(*d*) (1864), 2 H. & C. 906; 159 E. R. 375.

(*e*) For a somewhat unusual case, where, despite the defendant's signature, it was held that he was not estopped thereby as the plaintiff knew that the defendant could not read, see *Hitchman v. Avery* (1892), 8 T. L. R. 698.

(*f*) *Parker v. South Eastern Ry.* (1877), 2 C. P. D. 416, *per* Mellish, L.J., 421; *L'Estrange v. Graucob*, [1934] 2 K. B. 394.

such error he is estopped from pleading its existence; and even if the other party was aware of the error, or even if he procured it by his own fraud, the same estoppel will, in certain cases at least, operate in favour of an innocent assignee of the contract. Thus in *Howatson v. Webb* (g) A was induced by the fraud of B to execute a deed under a misapprehension of its contents. It was in reality a deed of mortgage of certain land to secure the payment to B of the sum of £1,000, and it contained the usual covenant to pay that sum. There was no such sum really owing, and A, though he knew that the deed disposed in some manner of the land in question, did not understand it to be a mortgage, and, indeed, executed it without having read it. The fraudulent mortgagee thereupon transferred the mortgage so obtained by him to C, a *bona fide* purchaser thereof. It was contended by the mortgagor that he was not liable to C for the amount of the mortgage debt, inasmuch as the deed was null and void for want of *consensus ad idem*. It was held, however, that, since the mortgage had passed into the hands of an assignee without notice of the fraud, the mortgagor was estopped from denying the truth of his acknowledgment of the existence of the mortgage debt.

§ 79. No Estoppel in Certain Cases: Non Est Factum

As we have indicated, this rule that a written contract is not invalidated even by mistake as to the contents of the instrument is subject to two exceptions. The first exception applies where the instrument has been executed otherwise than by signature. In such a case a party may sometimes be able to establish that the writing to which he assented did not sufficiently indicate the terms upon which the other party now relies so that the other party is estopped from setting them up. This type of case has already been discussed under the heading of communication of offer (h).

The second exception relates to instruments executed by signing, and includes all cases in which the common law plea of *non est factum* is available to the deceived or mistaken party—the plea, namely, that the instrument is not in truth the deed or instrument (*factum*) of that party. Early authorities, recognised by modern instances, have established the principle that this plea of *non est factum* is available not merely in cases in which the instrument is a forgery, or not in reality executed by the defendant at all, but

(g) [1907] 1 Ch. 537; [1908] 1 Ch. 1.

(h) See pp. 72 *et seq.*, *ante*.

also in cases where, though in fact executed by him, it is an instrument different in *kind* from that which he supposed it to be. It is not sufficient that its contents are found in material respects to be different from what he believed them to be, for if he chooses to sign an instrument he takes the risk of any mistake which relates to its contents merely. By executing the instrument he accepts the contents as they actually are, whatever his belief may have been. But he does not run the risk of the instrument belonging to an entirely different legal category from that to which he supposed it to belong. He did not intend to sign such an instrument, and therefore in contemplation of the law never did sign it, and he can plead *non est factum* accordingly, even against the other party who was wholly ignorant of any such error, and even against an innocent and ignorant assignee of the contract.

Thus in *Foster v. Mackinnon* (i) A was induced by the fraud of B to indorse a bill of exchange for £3,000 on the representation that it was a guarantee. The bill then passed into the possession of C as a holder in due course, who sued A for the amount of it. It was held that A was entitled to plead *non est factum*—that he had never signed the bill. In the words of the Court: "He never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." So in *Lewis v. Clay* (k) the defendant was induced by fraud to sign a promissory note as the maker thereof in the belief that he was merely witnessing the signature of another person to a power of attorney. The promissory note so signed by him was held void even in the hands of the plaintiff, a subsequent holder in due course. So in *Carlisle Banking Co. v. Bragg* (l) the defendant was induced by the fraud of another to sign a guarantee of that other's bank account in favour of the plaintiff bank. The defendant believed that the document signed by him was a mere form in connection with an insurance claim. It was held by the Court of Appeal that the guarantee given to the plaintiff bank was void (m).

Until the decision of the case last cited there was some authority for the proposition that the rule in question was excluded when the act of the defendant in executing the instrument was an act of negligence, and that it applied only to men, who, by reason of illiteracy, blindness, or other special circumstances, were excusable

(i) (1869), L. R. 4 C. P. 701, 711.

(k) (1898), 67 L. J. Q. B. 221.

(l) [1911] 1 K. B. 489.

(m) See also *Blay v. Pollard & Morris*, [1930] 1 K. B. 628.

for their act in signing a document which they had not taken the trouble to read. *Bragg's Case*, however, determines that the rule is general (n) and not subject to any such limitation, except possibly in the case of negotiable instruments passing into the hands of holders in due course who are put in a favoured position by statute. Ordinarily a man is under no duty of care so to guard his signature that it cannot be used as an instrument of fraud or forgery by other persons. The risk of finding that a signature has been so used lies upon the person who, without inquiry from him whose signature it purports to be, accepts it as genuine and operative.

The distinction so drawn by the law between error as to the *kind* of instrument signed and error as to the *contents* of the instrument signed—the distinction illustrated by *Carlisle Banking Co. v. Bragg* on the one side and *Howatson v. Webb* on the other—is one of some difficulty from a logical point of view. It requires further development and definition in order to become precise, but it must apparently be treated as well established.

§ 80. Error as to Implied Terms Inoperative

The rule that a contract is invalidated by *error in consensu* as to its terms applies only to mistakes as to its express terms, and has no application to those implied terms which are read into contracts by the law. It is entirely immaterial whether a party to a contract understands or misunderstands the existence or effect of the additional terms which the law will add by way of implication to the expressed agreement of the parties. Certain contracts for the sale of goods, for example, contain implied warranties, such as a warranty of merchantable quality or of fitness for the buyer's purpose—warranties which often have the result of imposing serious and unlooked-for liabilities upon the seller. But it would be idle for the seller to plead that neither he nor the buyer ever intended such terms or consequences. The intention from which implied terms proceed is a constructive intention attributed by the law to the parties independently of the existence of any actual consent on their part. In respect of implied terms and their results a contract.

(n) "If a document were presented to me written in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate—blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it". Buckley, L.J., [1911] 1 K. B., at p. 496.

whether written or unwritten, means for both parties what it means in law, and nothing else (o).

§ 81. Error in Consensu as to Terms of Contract and Rectification

Inasmuch as error as to the terms of the contract, where it operates at all, does so because it amounts to a negation of the agreement which, *prima facie*, the parties have reached, it follows that in such circumstances the remedy of rectification should be inapplicable. Rectification of an instrument intended to constitute the agreement between the parties presupposes that the parties at the time of executing the instrument were agreed as to what they intended the instrument to declare, but by accident the instrument has failed to give effect to their common intention. *Error in consensu* as to the terms of the contract means, however, that there was not, at the relevant time, any real agreement or common intention between the parties, and therefore implies the negation of the very basis of rectification (p).

It is sometimes said, however, that a departure from this principle was made in *Garrard v. Frankel* (q), *Harris v. Pepperell* (r), and *Paget v. Marshall* (s). In *Garrard v. Frankel* the plaintiff, intending to let certain premises to the defendant at a rent of £230, signed a lease in which by mistake the rent was stated to be £130. The defendant knew that £130 was in the lease, and also knew of the plaintiff's real intention. The plaintiff sought rectification or in the alternative cancellation; and in his bill offered to execute at his own expense a new lease. Romilly, M.R., held that the plaintiff was not entitled to an unconditional decree for rectification, but that the proper relief was to give the defendant the option of retaining the lease in a rectified form or else rejecting it. In *Harris v. Pepperell* a vendor sued for rectification of a conveyance which, he claimed, mistakenly comprised more land than he intended to convey. The case was essentially the same as *Garrard v. Frankel* and Lord Romilly, M.R., followed his previous decision.

These two cases were discussed before Bacon, V.C., in *Paget v. Marshall*, where a lessor claimed rectification of a lease which, he contended, by mistake extended to premises not intended by

(o) Cf. *Midland Great Western Ry. of Ireland v. Johnson* (1858), 6 H. L. Cas. 798; 10 E. R. 1509; *Powell v. Smith* (1872), L. R. 14 Eq. 85.

(p) See *Bentley v. Mackay* (1862), 4 De G. F. & J. 279, 286; 45 E. R. 1191, 1194.

(q) (1862), 30 Beav. 445; 54 E. R. 961.

(r) (1867), L. R. 5 Eq. 1.

(s) (1884), 28 Ch. D. 255.

him to be demised. The Vice-Chancellor followed the earlier decisions. He thus stated the principles upon which he proceeded (t): "If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the Court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it has never been entered into. That I take to be the clear conclusion to be drawn from the authorities." Then the Vice-Chancellor, after considering the facts before him, continued (u): "... the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the defendant should have an opportunity of choosing whether he will submit, as the plaintiff asks that he should submit, to have the lease rectified . . ., whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the Court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled."

Is there anything in these decisions which runs counter to the principle that rectification cannot be decreed against a party except on the basis that he and the other party were agreed at the time of execution of the instrument sought to be rectified? Clearly not. In each case the plaintiff was ready and willing to adhere to his original intention: in effect, by suing for rectification he renewed his original offer. The Court merely said that the defendant might accept that offer if he saw fit, and if he did so, then instead of leaving the parties to execute a new instrument, it would reform the old instrument to accord with the new agreement. The so-called decree of rectification in such cases merely gives effect to the new agreement between the parties: it does not correct the instrument by reference to an agreed intention as at the time when the

(t) 28 Ch. D., at 263.

(u) At p. 266.

instrument was executed. It is not, therefore, rectification in the strict sense, a decree correcting an *error in verbis*, at all, but merely a convenient substitute for the execution by the parties of an instrument to declare the agreement which they have at length reached (x).

§ 82. Mistake as to the Inducement of a Contract: Error in Causa

Having now dealt with the case of *error in verbis*—mistake in the expression of the genuine common intention of the parties—and also with *error in consensu*—a misunderstanding which prevents the existence of any *consensus ad idem* and therefore of any contract—we pass to the consideration of the third class of mistake, which we venture to call *error in causa*. In this case there is a true contract constituted by the genuine intention of the party or parties and the contractual declaration correctly expresses this intention. Nevertheless the contract has been based on some erroneous belief possessed by the party or by one or more of the parties as to the existence of some fact which does not exist. The supposed existence of this fact was the reason, inducement, or cause, or part of the reason, inducement, or cause, which led the mistaken party to make the contract. If he had known the truth he would not have entered into it. This is *error in causa contrahendi*. Thus a purchaser may agree to buy a piece of land because he believes that it contains valuable minerals below the surface, whereas it contains none; or a seller may part with his land for a small sum although, unknown to him, it contains minerals which make it a valuable property.

The general rule is that *error in causa* is wholly immaterial and irrelevant in respect of the validity and operation of a contract. This is so whether the erroneous belief is held by one party only or is common to both parties—*i.e.*, whether the error is unilateral or bilateral. The same general rule applies even though the existence of the erroneous belief in the mind of one party is known to the other (y). In general, a contracting party is in no way concerned with the inducements or reasons which lead the other party to enter into the contract. He is concerned solely with the terms of the contract, not with the beliefs or motives which underlie it. Having ascertained *what* the other party is prepared to agree

(x) See also Pollock, Contract (11th ed.), p. 397; and *Gun v. M'Carthy* (1883), 13 L. R. Ir. 304.

(y) *Smith v. Hughes* (1871), L. R. 6 Q. B. 597.

to, he need not concern himself with the question *why* he is so prepared. Even though he well knows that the other party is entering into the bargain under a material misconception as to the facts, he is in general entitled in law to say to himself: "What is that to me?" In general, a contract is regarded by the law as a bargain, in the making of which each party is entitled to the full benefit of his own superior knowledge, skill, and circumspection, and is under no obligation to take care of the interests of the other party.

This general rule that *error in causa* is irrelevant and inoperative is subject to two far-reaching exceptions. The first of these is the case where the mistake of one party is created by misrepresentation of the facts by the other—the case where one party is in a position to say: "I was not merely mistaken; I was deceived or misled by the other party." In this case, if the misrepresentation complained of fulfils certain conditions imposed by the law, it is operative so as to make the contract, not void, but voidable at the election of the party so deceived or misled. The second exception to the general rule is the case where the existence of the fact erroneously believed to exist forms the subject-matter of an express or implied term of the contract. Such a term may be a warranty, for breach of which damages may be recovered; and as well, or alternatively, it may be a condition the failure of which will render the contract voidable (z).

Thus he who buys a horse because he believes it to be sound, whereas it is not sound, cannot on this ground alone rescind the contract, for this in itself is merely an example of inoperative *error in causa*. If he wishes to rescind he must plead either (1) that the error was created by a misrepresentation of the seller to the effect that the horse was in fact sound, or (2) that, even though there was no such representation, he bought the horse conditionally upon its being sound, this condition being embodied in the contract either as an express term thereof or by implication of law.

Sometimes both of these grounds of invalidity occur and coexist in respect of the same contract. The error is not merely created by misrepresentation, but also amounts to the failure of a conventional condition forming an express or implied term of the contract. The seller of a jewel may represent the stone to be a genuine diamond, and the buyer may agree to buy it on condition that it is so. In other cases one only of these pleas is available

(z) At p. 55, *ante*.

to the mistaken party. The error may have been induced by misrepresentation, but may not be the subject-matter of any condition of the contract; or the error may amount to a failure of condition, but may not have been induced by any misrepresentation. The seller may say: "I do not know whether this stone is a genuine diamond or not, and I make no representation on the matter, but I agree that its genuineness shall be a condition of the contract of sale" (a).

The operation of misrepresentation, whether fraudulent or innocent, in inducing *error in causa* and thereby invalidating a contract will be the subject of special and detailed consideration in the next succeeding chapter, and need not be further adverted to in this place. It is necessary, however, here to make certain observations as to the second kind of invalidating error—namely, that which amounts to the failure of an express or implied condition of the contract.

§ 83. Essential Error Amounting to a Failure of Condition

Error in causa may operate to invalidate a contract because it involves the failure of an express condition or because it involves the failure of an implied condition. As to the first case we need say little. The existence of any fact, however unimportant (b), may be made an express condition of the contract, and if that fact does not in truth exist the contract may be void or voidable (c) accordingly.

Error Amounting to Failure of Implied Condition. As to the second case, the law will supplement the express intention of the party or parties by reading into any contract relating to a specific and ascertained subject-matter (d) an implied condition that that subject-matter is, at the time when the contract is made, in existence and of the same essential kind as described in the contract. In other words it is an implied condition of such a contract that all facts exist at the time of its making the non-existence of which would mean the non-existence of the subject-matter of the contract, either because the subject-matter had at

(a) Cf. Branson, J., *Pennsylvania Shipping Co. v. Compagnie National de Navigation*, [1936] 2 A. E. R. 1167, 1172-2.

(b) Lord Blackburn in *Thomson v. Weems* (1884), 9 App. Cas. 671, 683.

(c) See p. 55, *ante*.

(d) *Harrison v. Knowles*, [1917] 2 K. B. 606, 610; affirmed by the Court of Appeal on different grounds, [1918] 1 K. B. 608; *Taylor v. Combined Buyers, Ltd.*, [1924] N. Z. L. R. 627, 636, 641.

that time ceased to exist at all, or because it was then something essentially different from what it appeared from the contract to have been assumed to be. For this purpose a specific and ascertained subject-matter includes an unascertained part of such a subject-matter (e). It is manifest that the implication of such a condition would be inappropriate where the subject-matter of the contract was not ascertained at least to this extent. Whether A and B agree that A should buy B's flock of sheep or 500 head out of that flock the foundation of the contract is the existence at the time of its making of B's flock of sheep. In either case, therefore, the existence of the flock at that time is a condition of the contract; and if the flock had then ceased to exist the contract in either case would be void. If, however, A merely agrees to sell B 500 sheep, being (according to the contract) neither an ascertained flock nor to be taken from an ascertained flock, it is no part of the contract, much less the foundation of it, that any particular sheep should be in existence at the time of its making.

Non-existence of Specific Subject-matter. So far as such an implied condition relates to the non-existence of a specific subject-matter erroneously supposed to exist, its application is ordinarily easy, and may be illustrated by the well-known case of *Couturier v. Hastie* (f), where a contract for the sale and purchase of a cargo at sea was held invalid because, unknown to the parties, the cargo, having been damaged by perils of the sea, had already been discharged from the ship and sold. So by the Sale of Goods Act, 1893 (g), it is provided that where there is a contract for the sale of specific goods and the goods, without the knowledge of the seller, have perished at the time the contract is made, the contract is void. This provision was considered and applied by Wright, J. (as he then was). in *Barrow, Lane and Ballard, Ltd. v. Phillips* (h), where a contract had been entered into for the sale of a specific parcel of 700 bags of nuts stored in a particular warehouse. At the time of the making of the contract 109 bags had, unknown to the parties, disappeared by reason of the dishonesty of some third person. Wright, J., considered that the subject-matter of the contract was an indivisible parcel of 700 bags, and as this no longer

(e) Cf. Chalmers, *Sale of Goods* (11th ed.), pp. 34, 163 (notes to ss. 6 and 62, *Sale of Goods Act, 1893*); *Barrow Lane and Ballard, Ltd. v. Phillips*, [1929] 1 K. B. 574, 583.

(f) (1856), 5 H. L. C. 673; 10 E. R. 1065.

(g) S. 6.

(h) [1929] 1 K. B. 574.

is that the belief which a man actually possesses must be of the same nature and degree as that which is indicated by the nature and form of the representations made by him. He is fraudulent if he indicates a degree of belief greater than that which he actually possesses; honest if he accurately indicates that degree of belief, however erroneous the belief may be. The degree of belief so indicated by him must be judged both by reference to the words used by him and by reference to the subject-matter of the statement. If he says that yesterday he bought a coat at a certain shop he is properly held to mean that he knows that he did so—not merely that he thinks so, or is of opinion that he did so. If, on the other hand, he says that the coat was not worth the money that he paid for it the true meaning of this statement is that he is of that opinion. So if in answer to the questions of an insurance company he says that he is in good health he means merely that he is unaware of any reason for thinking or suspecting otherwise. So with respect to any matter of fact a representation may assume different forms in respect of the degree of belief indicated. A man may say that the fact is so, which means in ordinary cases that he knows it to be so; or he may say that he believes it to be so, a form of expression which in popular speech commonly indicates a certain amount of doubt; or that he thinks that it is so; or that he is of opinion that it is so; and so on. In every case he is fraudulent if he overstates the degree of subjective assurance so possessed by him; honest if he expresses it accurately.

In the law of fraud intentional ignorance of a fact is equivalent to knowledge of it. He who purposely shuts his eyes and avoids inquiry in order that he may not ascertain the truth cannot avail himself of his ignorance of it on a charge of misrepresentation. For such conduct is the ground of a legitimate inference that he suspected the truth and feared it, and therefore did not in reality possess any genuine belief in the representation made by him (*m*).

We see, then, that when the question is one of fraud or no fraud the test is always subjective, not objective. When, on the contrary, the question is one of innocent misrepresentation the case is different. Here the test is sometimes objective and sometimes subjective. This depends on the form of the representation made. It may relate either to objective facts or to subjective belief. A man may say, "The facts are so-and-so". Or he may say merely, "It is my belief or my opinion that they are so-and-so". If his

(*m*) Lord Herschell, *Derry v. Peek* (1889), 14 App. Cas. 337, 376.

existed at the time of the making of the contract. he held the contract to be void.

Non-existence of Essential Fact. When the application of the implied condition depends on the non-existence of some fact going to the essential nature of the subject-matter of the contract the case is more difficult. The difficulty is inherent in the very distinction between the essential nature of a thing and its unessential attributes; between its class or species and its quality or state; *between differences of kind and of degree.* Of this distinction Sir John Salmond, in his judgment in *Taylor v. Combined Buyers, Ltd.* (i) said: "Expressing the same principle in the language familiar to the Aristotelean and scholastic logic from which it was derived, operative misdescription is that which creates *error in substantia* or *in essentia*, as opposed to mere error in respect of the *accidentia*, the unessential attributes of the thing which is the subject of the contract. The same distinction was recognised by the Roman law as to the sale of goods, and it is probably from this source that it found its way into the common law. '*Si aes pro auro veneat non valet*', said Ulpian (k). The distinction has its ultimate source in the principles of that partially forgotten logic which distinguishes between the essential qualities of a thing—namely those which entitle it to be placed in a particular species of things as possessing the *essentia* of that species—and those accidental qualities which may or may not be possessed by the various members of that species. It may well be that this distinction between differences of kind or essence and differences of quality or accident is difficult of application, and is based rather on considerations of the customary use of language than on any deeper foundation."

Essential Error and Unessential Error. Error, whether as to the existence of a thing or as to its essential nature, may be conveniently called, in the language of the schoolmen, *error in essentia* or essential error.

A leading illustration of the application in the present context of this distinction between essential and unessential error is *Kennedy v. Panama Mail Co.* (l). In that case certain shareholders in a shipping company claimed to be entitled to repudiate their

(i) [1924] N. Z. L. R. 627, 640.

(k) D. 18, 1, 14

(l) (1867), L. R. 2 Q. B. 580.

shares on the ground that they had taken them up in reliance on an erroneous, although honest, statement in a prospectus to the effect that the company had secured a mail contract with a colonial government and was raising further capital for the purpose of carrying out that contract, the alleged mail contract being in truth invalid. The Court of Queen's Bench held that the shareholders were not entitled to repudiate the shares as the statement was not fraudulent, and the shares actually allotted were not essentially different in kind from what they were represented to be. Blackburn, J., delivering the judgment of the Court, said (*m*): "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration (*n*). For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract."

Kennedy v. Panama was recently applied by the House of

(*m*) P 587.

(*n*) In *Taylor v. Combined Buyers, Ltd.*, [1924] N. Z. L. R. 627, 641, Sir John Salmond, commenting upon this reference to failure of consideration, said: "I do not profess to understand the significance of this addition. The effect of *error in substantia* does not, as I understand the matter, depend on the existence of any complete or partial failure of consideration, in the sense that the thing as it actually exists is valueless or is of less value than the thing as described. The purchaser is entitled to say that it is not the kind of thing that he agreed to buy, even though it is of equal value. Probably all that is meant by Blackburn, J., in referring to failure of consideration is that the consideration of the buyer's promise to pay is that he shall obtain a thing of the kind that he agreed to buy, and if he does not get a thing of this kind there is in this sense a failure of consideration invalidating the contract."

Lords in *Bell v. Lever Brothers, Ltd.* (o). There A, for a large sum, purchased from B a release from a contract to employ B. At the time B, unknown to A, had committed such breaches of the contract as would have entitled A then and there to have rescinded it. A now claimed to avoid the release and recover what he had paid. The House of Lords decided against him. In the view of the majority of the House the fact of the released contract being voidable by A did not make the release different in kind from what it would have been had the released contract not been so voidable. The test, said Lord Atkin (p), was: "Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?" Lord Thankerton said (q) that in all of the authorities "it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract, or it was an inevitable inference from the nature of the contract that all parties so regarded it" (r).

Kennedy v. Panama and *Bell v. Lever* were both cases in which the error was held not to come within the scope of the implied condition. In *Cooper v. Phibbs* (s) the decision was the other way. There A agreed to take a lease of a fishery from B, though contrary to the belief of both parties A was at the time tenant for life of the fishery, and B apparently had no title at all. The agreement was set aside on the ground of error. So in *Strickland v. Turner* (t) a contract for the assignment of an annuity for the lifetime of A was held invalid because of the death of A before the date of the contract, both parties believing that he was still alive. So in *Scott v. Coulson* (u) a policy on the life of A was purchased by B from C after A was dead, but while both B and C believed him to be alive. It was held that the purchaser could not enforce the contract so as to entitle himself to the accrued insurance moneys, for the basis of the contract was the assumed existence of a current

(o) [1932] A. C. 161.

(p) At p. 227.

(q) At p. 236.

(r) So a separation agreement entered into between parties to a marriage which is afterwards annulled by reason of the incapacity of one of the parties to consummate the marriage is not to be regarded as void for essential error *Adams v. Adams*, [1941] 1 K. B. 536. Such a marriage is not a nullity and void *ab initio* but merely voidable by the obtaining of a decree of nullity, and not to be regarded as different in kind from a marriage which is not so voidable: *ib.* pp. 541-2, 547-8. Cf. p. 224, n. (y), *post*.

(s) (1867), L. R. 2 H. L. 149.

(t) (1852), 7 Ex. 208; 155 E. R. 919.

(u) [1903] 2 Ch. 249.

policy on the life of an existing person, and this was therefore an implied condition upon which the contract depended (x) (y).

Contracts for the Sale of Land. The principle of essential error may also be illustrated by reference to contracts for the acquisition of interests in land. Substantial correspondence of the land in respect of estate and tenure (a), title (b), area and boundaries (c), and quality (d) with the contractual description of it is essential. Commonly, indeed, contracts relating to the acquisition of land contain an express term providing to a greater or less extent what is to be the effect of disconformity of the property with its contractual description. What, in such cases, is substantial compliance with the contract as a whole can, of course, be ascertained only by taking into account the amount of variation from the description permitted by that term. The leading case of this kind is *Flight v. Booth* (e). In that case conditions of sale of a leasehold property stated that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter". In fact the lease prohibited a great many other forms of business, many of which would not be described as offensive. The conditions of sale provided that "if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way". Notwithstanding this condition the purchaser claimed to rescind

(x) In *Taylor v. Combined Buyers, Ltd.*, [1924] N. Z. L. R. 627, Sir John Salmond held that a second-hand motor car was different in kind from a new motor car.

(y) So where the parties to a marriage void as being bigamous or because the parties are within the prohibited degrees of affinity enter into a separation contract in the belief that the marriage is valid, the separation contract is void because the non-existence of the marriage constitutes the failure of an implied condition of the contract. *Galloway v. Galloway* (1914), 30 T. L. R. 531; *Laur v. Harragin* (1917), 33 T. L. R. 381; *Adams v. Adams*, [1941] 1 K. B. 536, 548. Cf. p. 365, note (r), *ante*.

(a) *Fordyce v. Ford* (1794), 4 Bro. C. C. 494, 496-7; 29 E. R. 1007, 1008; *Torrance v. Bolton* (1872), L. R. 14 Eq. 124; *Re Lloyds Bank and Lillingston's Contract*, [1912] 1 Ch. 601.

(b) *Flight v. Booth* (1834), 1 Bing. N. C. 370; 131 E. R. 1160; *Harnett v. Baker* (1875), L. R. 20 Eq. 50.

(c) *Jacobs v. Recell*, [1900] 2 Ch. 858; *Brewer v. Brown* (1834), 28 Ch. D. 309.

(d) *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258.

(e) (1834), 1 Bing. N. C. 370; 131 E. R. 1160.

the contract for the misdescription and to recover his deposit. The Court of Common Pleas decided for him, Tindal, C.J., in words which have become classical, thus stating the principle applicable (f) : "where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale. . . ." The effect of the term as to error or misdescription in qualifying the contractual description is taken into account in the earlier part of this passage. To the extent that the misdescription was covered by this term it could not be supposed that the purchaser would not have entered into the contract. If, indeed, the contractual description in such cases be regarded as the combination of the description in the strict sense together with the term as to errors and misstatements it will be seen that Tindal, C.J.'s, statement becomes identical with the ordinary rule as to *error in essentia*. Whether there be a term as to error and misstatement or not, the discrepancy must be such "that the purchaser may be considered as not having purchased the thing which was really the subject of the sale".

§ 84. Mistake as to the Identity or Quality of Other Contracting Party (g)

A party entering into a contract may be mistaken as to some matter relating to the other contracting party just as he may be mistaken as to other matters affecting the contract. If such a mistake as to the other contracting party amounts to a mistake as to his identity, *i.e.*, if A contracts with B believing him to be C, it will, subject to the principle of estoppel, prevent any agreement being formed between the parties. A intended to contract with C, but it is B, not C, who has purported to contract with A. This is not agreement but disagreement and the case is one of *error in consensu*. From this type of case must be

(f) P. 377, E. R. 1162.

(g) Many of the difficulties which formerly attended this topic have been removed by Dr. A. L. Goodhart's illuminating article in 57 L. Q. R. 228.

clearly distinguished the case where one party contracts with another not because he believes him to be a third person but because he believes him to possess some quality which he does not possess—as where A contracts with B thinking him to be a substantial merchant whereas he is but a man of straw. Cases of this sort are merely cases of error as to a matter of inducement not preventing the formation of a genuine agreement. That is to say, they are cases of *error in causa*, not *error in consensu*.

Mistaken Identity. Cases of error as to identity amounting to *error in consensu* are presumably governed by the same qualifications as govern *error in consensu* in general. If A makes an offer to B, and B accepts it, believing, in accordance with its terms, that it is meant for him, A will not be permitted to escape from the contract on the plea that he mistook B for some other person. He will be estopped from setting up such a case. On the other hand if A makes an offer which is clearly addressed to and intended for B, C cannot by purporting to accept it enter into a contract with A. So if A makes an offer to B and B purports to accept it in language which clearly shows that he thought he was accepting an offer made by C, A cannot treat the acceptance as constituting a contract. In *Boulton v. Jones* (h) the defendant sent a written order for goods addressed by name to one Brocklehurst, a shopkeeper, who, however, unknown to the defendant, had recently sold his business to the plaintiff. The plaintiff received the order so addressed to his predecessor, and fulfilled it by delivering the goods. It was held that he could not recover from the defendant the price of the goods so supplied to him, because there was no contract between them. So in *Cundy v. Lindsay* (i) one Blenkarn wrote a letter to the plaintiffs, and purposely worded and signed it in such a way as to deceive them into believing that it came from the known and reputable firm of Blenkiron. In this belief and in response to the letter the plaintiffs delivered the goods at Blenkarn's place of business. He subsequently disposed of them to a *bona fide* purchaser for value, and the plaintiffs, on discovery of the fraud, sued this subsequent purchaser for the value of the goods. The plaintiffs' right to succeed in the action depended, on one view of the matter, on whether the contract between them and Blenkarn

(h) (1857), 2 H. & N. 564; 157 E. R. 232.

(i) (1878), 3 App. Cas. 459.

was wholly void for *error in consensu* or was merely voidable for fraud. If merely voidable, it was now too late to rescind it; but if void, the property in the goods still remained vested in the plaintiffs, and they could sue the defendant for the conversion of them. It was held by the House of Lords that the contract was void for want of the necessary *consensus ad idem*, and the plaintiffs succeeded accordingly. So in *Baillie's Case* (1) A was induced by the fraud of a company's officers to apply for membership therein under the erroneous belief that it was a different company of a similar name. It was held that the contract was not merely voidable for fraud, but was wholly void *ab initio* on account of error as to the identity of the company, and that A was entitled accordingly to be removed from the list of shareholders, even although the company had since gone into liquidation.

The application of the rule of *error in consensu* to cases of mistaken identity is of chief difficulty where the contract does not in terms identify with any particular person the party as to whose identity the other party now alleges that he was mistaken. On principle the solution of such a case must turn on the general law of estoppel. If the error of the mistaken party was known to the other it would operate to avoid the contract (m). If it was not, then the question is simply whether a reasonable man in the other party's position would have supposed himself to be the person with whom the mistaken party intended to deal. If the answer to this question is in the affirmative, the mistaken party will be estopped from setting up his error. These distinctions may be illustrated as follows. A has for some time engaged in dealings of a reciprocal character with a shopkeeper Y, no cash passing but the course of dealing being so regulated that the sums owing on each side balance from time to time. At a time when the account shows Y as a substantial debtor to A, Y retires from business, and X, to whom the foregoing facts are known, takes over Y's shop. Next day and before any announcement has been made of the change in the ownership of the shop and business A sends an oral message to what is now X's shop ordering a quantity of goods sufficient to cover the sum owed to him by Y. On these facts it is submitted that X as a reasonable man could not suppose that the order was meant for him and that even if

(1) [1898] 1 Ch. 110.

(m) Cf. *Baillie's Case*, [1898] 1 Ch. 110.

he purported to accept it no contract would thereby be constituted between him and A. With this may be contrasted the case where X had no knowledge of the previous course of dealing between A and Y or of any other circumstance which might suggest that it was material to A to contract with Y rather than X. In such a case X might reasonably assume that A's offer was neither to Y nor to himself as a specific individual but simply to whoever happened to be the shopkeeper for the time being; and if so a contract would be constituted between A and X by X's accepting the order.

Mistake as to Quality of the Other Party. Where the error of one contracting party as to the other is not as to the identity of the other but as to some quality of that other the situation is fundamentally different. Here the principle to be applied is the ordinary rule of *error in causa*, viz., that such error is inoperative unless it is induced by misrepresentation or there is a term as to the matter in the contract. So if an impecunious impostor X, adopting the alias of Y, a non-existent person represented by X to Z to be a person of substance, thereby induces Z to contract with him, the contract is not void for *error in consensu*, for Z intended to contract with the person with whom he dealt; but it is voidable for *error in causa* resulting from fraud, for Z was induced so to deal by the false representation that X possessed the quality of being wealthy which had been attributed by him to himself under the name of Y (n).

The distinction between error as to the identity of the other party and error as to some quality possessed by him is logically clear, but in practice its application has sometimes not been free from doubt. This may be illustrated by *Phillips v. Brooks* (o). There a swindler went into a jeweller's shop, falsely representing himself to be A B, an existing person known by repute to the shopkeeper as of good credit, and purchased a diamond ring of which he there and then took delivery, and for which he paid by a valueless cheque drawn in the name of A B. He pawned the ring so obtained, and the shopkeeper on discovery of the fraud sued the pawnbroker for the return of the ring. The question depended on whether the sale was wholly void because of *error*

(n) *King's Norton Metal Co., Ltd. v. Edridge Merrett & Co., Ltd.* (1897), 14 T. L. R. 98; *Fletcher v. Krell* (1873), 42 L. J. Q. B. 55.

(o) [1919] 2 K. B. 243.

in consensu or was merely voidable for fraud. It was held by Horridge, J., to be voidable merely, and the pawnbroker kept the ring accordingly. The ground of the decision was that there was no invalidating mistake as to the identity of the purchaser, who was identified by sight and hearing as the person actually present in the shop. It is true that the shopkeeper believed the person so present to be another person—namely A B; but this, in the view of the learned Judge, did not produce *error in consensu*; it was merely *error in causa*: a mistaken belief which induced the shopkeeper intentionally to deal with the person with whom he did actually deal—namely, the person present in the shop. The transaction was interpreted as meaning: “I sell this ring to you, the person personally present in my shop, because I believe you to be A B”, not as meaning: “I sell this ring to A B”. The distinction so drawn is of extreme subtlety, and even were there no authority to the contrary might be thought of doubtful validity. Fortunately it also appears (*p*) to be inconsistent with the decision of the Court of Exchequer in *Hardman v. Booth* (*q*), and one may say with some confidence, therefore, that it is not merely unsatisfactory but also wrong. In *Hardman v. Booth* one of the plaintiffs called at the place of business of Gandell & Co., and, asking for Messrs. Gandell, was introduced to Edward Gandell. Edward Gandell was not a member of the firm but led the plaintiffs to believe that he was, and under that belief the plaintiffs supplied goods to the firm’s place of business, invoicing them, at Edward Gandell’s request, to Edward Gandell & Co. Edward Gandell having afterwards pledged the goods the plaintiffs sued the pledgee for conversion. It was held that the plaintiffs were entitled to succeed, for although Edward Gandell had been personally present when the plaintiffs had dealt with him, the plaintiffs, to Edward Gandell’s knowledge, had intended to deal with Gandell & Co., and hence the case was one of *error in consensu* and there was no sale to divest the plaintiffs’ title to the goods. Pollock, C.B. (*r*), said: “Mr. Hawkins contended that there was a contract personally with Edward Gandell, the individual with whom the conversations took place. It is true that the words were uttered by and to him, but the plaintiffs supposed that they were dealing with Gandell & Co., the packers,

(*p*) As Dr. A. L. Goodhart has pointed out: 57 L. Q. R. at 241.

(*q*) (1863), 1 H. & C. 803; 158 E. R. 1107; approved by Lords Hatherley and Penzance in *Cundy v. Lindsay* (1878), 3 App. Cas. 459, 467, 471.

(*r*) P. 806, E. R. 1109.

to whom they sent the goods; the fact being that Edward Gandell was not a member of that firm and had no authority to act as their agent. Therefore at no period of time were there two consenting minds to the same agreement."

A further illustration of the difficulty sometimes resulting in the present context from the distinction between *error in consensu* and *error in causa* is afforded where A, who would not knowingly have contracted with B, nevertheless contracts with him in the mistaken belief that he is not B. It will be observed that this is not the case where A contracts with B thinking him to be C. It is the case where A, being willing to contract with anyone but B, nevertheless contracts with B through ignorance that he is B. If B knows of A's error what is the position? There is no *error in consensu* for A intends to contract with the person with whom in fact he deals. Nevertheless A enters into the contract because he mistakenly believes that the party with whom he contracts and intends to contract lacks or possesses certain qualities which that party does not lack or possess. That is to say, although A is not mistaken in such a way as to prevent the formation of an agreement between him and B he is mistaken as to a matter of inducement. His mistake, therefore, is merely *error in causa*, and in the absence of a term in the contract that B is not B, or any misrepresentation by B, the contract is good notwithstanding the mistake (s).

(s) See Dr. Goodhart's article in 57 L. Q. R. at pp. 241 ff. The statement in the text is in conflict with certain of the reasons given by Tucker, J., for his decision in the recent case of *Sowler v. Potter*, [1939] 4 A. E. R. 478, but these are difficult to reconcile with the general and settled principles of the English law of mistake in relation to contract, and the present writer ventures to concur in Dr. Goodhart's adverse criticism of this aspect of *Sowler v. Potter*. Cf. also *Said v. Butt*, [1920] 3 K. B. 497, as to which see Goodhart and Hamson in 4 Cambridge Law Journal, pp 350 ff.

CHAPTER XI

MISREPRESENTATION

§ 85. Misrepresentation—Fraudulent or Innocent; Actionable or Invalidating

In order to avoid circumlocution it is well to adopt convenient terms by which to distinguish between the party who makes a representation and the party to whom he makes it. There are none which have received judicial or authentic recognition for this purpose, but a learned writer has recently adopted the terms *representor* and *representee*, and it does not seem possible to suggest any better usage.

Misrepresentation is of two kinds, being either fraudulent or innocent; that is to say, it may either amount to a wilful and conscious falsehood intended to deceive the representee, or it may, on the contrary, be merely an honest mistake on the part of the representor, by which the representee is misled though not wilfully deceived. The first kind is called fraud or deceit; the second has no other recognised name than innocent misrepresentation.

Disregarding for the time being certain minor considerations, the legal consequences of misrepresentation in the making of a contract are two in number. In the first place, it may confer upon the representee a right of action for damages for any loss suffered by him through being thus induced to make a contract which he would not otherwise have entered into. In the second place, it may confer upon the representee a right to repudiate the contract which he was so induced to make. In other words, misrepresentation may be either (1) an actionable injury or tort, for which the other party to the contract may recover damages, or (2) a ground of invalidity of the contract itself. As producing the first of those consequences it may be termed *actionable* misrepresentation, and as producing the second it may be distinguished as *invalidating* misrepresentation.

We are not here concerned, except incidentally, with actionable misrepresentation. It pertains not to the law of contracts, but to that of torts (*a*). The rules as to it are in no way limited to

(a) See Salmond, Torts (10th ed.), Ch. XVIII.

those misrepresentations which induce contracts, but apply generally to damage suffered in consequence of acting in any manner on the faith of a misrepresentation, whether by entering into a contract, or by transferring property, or in any other way. There is, however, one rule which calls for notice in this connection, as bearing on the rights of contracting parties, and as constituting an important distinction between actionable and invalidating misrepresentation. In order to constitute a cause of action for damages in tort a misrepresentation must be fraudulent.

Innocent misrepresentation is not actionable, whatever its effect may be in invalidating the contract. To recover damages as for a tort the plaintiff must prove not merely that he has been misled, but that he has been wilfully deceived; although, as we shall see, it may be sufficient for him to prove that he has been innocently misled if all that he seeks is the rescission of the contract which he has been thus induced to make. Nor does it make any difference, so far as a cause of action for damages is concerned, that the representor was guilty of negligence in making the erroneous statement by which the representee was so misled to his own harm. A man is under no general legal duty to use care in the statements made by him so as to avoid causing loss to others who choose to act upon them, and this is so even though he intended them so to act. His only legal duty is to refrain from wilfully and knowingly deceiving them. For his honest error he is not responsible, howsoever negligent, in the absence of some special duty of care imposed on him by contract or otherwise in the particular case. They who choose to act in reliance on what another tells them do so in general at their own risk and not at his. This important principle of civil liability was established by the House of Lords in the year 1889 in the leading case of *Derry v. Peek* (b), which finally overruled an opinion to the contrary which up to that time had received no little support in judicial *dicta* and even decisions. All authorities prior to the year 1889 must therefore be now read in the light of the rule established by *Derry v. Peek*, and so far as they say or suggest that in an action for damages for misrepresentation anything less than actual fraud constitutes a good cause of action in the absence of some special duty arising *inter partes* by contract or otherwise those authorities must now be disregarded. In *Derry v. Peek* shareholders in a company sought to recover damages from the directors for being

(b) (1889), 14 App. Cas. 337.

induced to take shares in that company by serious misstatements of fact in a prospectus issued by those directors. It was held that, in the absence of proof of wilful fraud, the defendants, however negligent, were not liable.

§ 86. Common Law Remedies (other than Damages for Deceit) in Respect of Contracts Induced by Misrepresentation

Fraud and Innocent Misrepresentation at Common Law. It is in all probability an authentic principle of the modern law of contracts that (with perhaps some exceptions (*c*)) any contract into which one party is induced to enter by the misrepresentation, whether fraudulent or innocent, of the other is voidable at the election of him who is so induced (*d*). This principle, in so far as it relates to innocent misrepresentation, is equitable in its nature. A very different principle prevailed in the common law. At common law an essential distinction was drawn between fraud and innocent misrepresentation. All fraud invalidated a contract induced by it, but innocent misrepresentation had in general no such effect. Honest misstatements of fact had generally at common law no more operation as a ground of contractual invalidity than as a ground of action. Whether the representee was seeking damages, or was setting up that he had lawfully rescinded the contract, he must prove not merely that he had been misled, but that he had been wilfully deceived (*e*).

Innocent Misrepresentation as Breach of Implied Condition. Even at common law, however, although innocent misrepresentation does not, like fraud, operate *per se* to invalidate the contract, it may and does in certain special cases produce the same result indirectly, where the truth of the representation is imported into the contract itself as an implied condition thereof. The representee cannot at common law say, "I refuse to be bound by this contract, because I was induced to make it by your mistaken assurance that the facts were so-and-so". But even at common law he can say in a proper case, "I am not bound by this contract, because it was made upon the implied, if not the express, condition that the facts were in truth as represented by you; the facts are not so;

(*c*) At p. 241, *post*.

(*d*) *Derry v. Peek* (1889), 14 App. Cas. 337, *per* Lord Bramwell, 347; *MacKenzie v. Royal Bank of Canada*, [1934] A. C. 468, 475 (P. C., *per* Lord Atkin).

(*e*) *Street v. Blay* (1831), 2 B. & Ad. 456, 461-2; 109 E. R. 1212; *Kennedy v. Panama, etc., Mail Co.* (1867), L. R. 2 Q. B. 580, 587; see also *May v. Platt*, [1900] 1 Ch. 616, 623.

formed the subject-matter of a collateral contract separate from the main contract (q).

It should be observed that, a collateral contract, as distinct from a term in a larger contract, always depends on an actual *animus contrahendi* (r) and therefore cannot be implied in law.

Ordinarily the existence, whether as an additional term in the contract or as a collateral contract, of an express provision as to the truth of a representation is a question of fact to be settled by the jury; subject to this, that it is a question of law for the Judge whether sufficient evidence has been adduced to send to the jury (s). Where, however, the words of the contract and the representation are in writing, the question becomes one of the construction of a written instrument and is for the Judge, the opinion of the jury being taken only as to any relevant extrinsic circumstances which may be in controversy (t). Whether, having regard to the express terms and special circumstances of a particular contract, a term as to the truth of a representation should be implied by law is a question for the Judge (u).

Misrepresentation as Breach of Warranty or Condition. If it is found that the parties have either expressly or impliedly made the truth of the representation the subject-matter of a term of the contract the further question will arise of whether this term is to be regarded as a warranty, a condition, or both. This question also will, according to the circumstances, be one of fact for the jury, or of law for the Judge. If, indeed, the contract is in writing and the representation appears in the contract, then the Judge, having found that a term should be implied in the contract as to the truth of the representation, will be helped in determining the nature of this term by the canon of construction enunciated in *Behn v. Burness* (x): "But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the

(q) *De Lassalle v. Guildford*, [1901] 2 K. B. 215; *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113; see also *Erskine v. Adeane* (1873), L. R. 8 Ch. 756; *Angell v. Duke* (1875), L. R. 10 Q. B. 174; and *Heilbut Symons & Co. v. Buckleton*, [1913] A. C. 30; and pp. 151, 177, *ante*.

(r) *Heilbut Symons & Co. v. Buckleton*, [1913] A. C. 30, 37, 47.

(s) *S.c.*

(t) *Bentsen v. Taylor*, [1893] 2 Q. B. 274, 280-1.

(u) Cf. *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. 205, 213, 222.

(x) (1863), 3 B. & S. 751, 755, 122 E. R. 281, 283.

contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour" (y) (z).

It has been stated by high authority (a) that, in applying these principles, the common law Courts, moved by the desire to alleviate somewhat the rigour of the rule that for innocent misrepresentation as such there was no remedy, sometimes showed more liberality towards the injured party than strict doctrine warranted. Thus, where the question was whether there was sufficient evidence to go to the jury, the common law Judges, it is said, would sometimes display a singular acuteness in discerning that the plaintiff had made out the necessary *prima facie* case (b). In so far as this approach to the problem resulted in the finding of a warranty so that on breach the representor would be liable in damages, it was vigorously condemned by Lord Moulton in *Heilbut Symons & Co. v. Buckleton* (c).

"On the Common Law side of the Court", said Lord Moulton, "the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. . . . But in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt, C.J., with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended'. So far as decisions are concerned, this has, on the whole, been consistently followed in the Courts of Common Law. But from time to time there have been dicta inconsistent with it which have, unfortunately, found their way into text-books and have given rise to confusion and uncertainty in this branch of the law. . . . It is . . . of the greatest importance, in my opinion, that

(y) As to the effect of such partial execution in favour of the party seeking to rescind, see p. 547, *post*.

(z) See also *Bentsen v. Taylor, ubi supra*.

(a) Lord Moulton in *Heilbut Symons & Co. v. Buckleton*, [1913] A. C. 30, 49-50; Viscount Haldane in *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, 422-3.

(b) *Heilbut Symons & Co. v. Buckleton*, *per* Viscount Haldane, L.C., 38.

(c) At. pp. 49-51.

this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."

It is easy to acquiesce in Lord Moulton's strictures and his exhortation in favour of rigid adherence to principle in cases where a party who has been misled is entitled to rescission either for fraud or on the principle of *Redgrave v. Hurd* (d). The recent case of *Otto v. Bolton* (e) seems to suggest, however, that where rescission is not available on these grounds the Courts are still not unwilling to discern in somewhat slight circumstances evidence of an intention in the parties that the representor should bind himself contractually in respect of any representation affecting the subject-matter of the contract in a direct and substantial way. In *Otto v. Bolton* the defendant, in the course of negotiating with the plaintiff for the sale to her of a house, assured her that the house was well built. The written contract afterwards entered into contained no reference to this assurance. The house was duly conveyed to the purchaser and subsequently serious defects in its construction became apparent. It was held by Atkinson, J., that the purchaser was entitled to damages on the grounds that the vendor's assurance that the house was well built was intended by the parties to be a collateral contract in the nature of a warranty. "I accept", said the learned Judge, "the statement of Miss Otto that she relied on the defendant Norris's assurance as to the house being well built, and that she would not have bought but for that assurance. Mr. Norris admitted that he so assured her that the house was well built: he says that it was a serious statement, which he knew would influence her mind, and that he intended her to believe that he was selling a well-built house and intended her to think that he was promising that it was a well-built house. I have no doubt that this statement amounted to a warranty" (f).

Application of Rules as to Error in *Essentia*. Before leaving the topic of the common law remedies in respect of misrepresentation inducing a contract we may notice that in certain circumstances the common law rules as to *error in essentia* (g) sometimes seem to afford a remedy for such misrepresentation. If, in bargaining about some specific thing, one party so represents or

(d) (1881), 20 Ch. D. 1; see p. 239, *post*.

(e) [1936] 2 K. B. 46.

(f) See, however, *Terrene, Ltd. v. Nelson*, [1937] 3 A. E. R. 739.

(g) See p. 219, *ante*.

describes it to the other that the other reasonably considers it to be of a kind essentially different from what in fact it is, then upon a contract being concluded expressly or impliedly describing the thing in this misleading and erroneous way, the party thus misled may, when the thing is tendered to him, reject it for non-compliance with the description, rescind the contract, and sue for damages. Here the rescinding party may well say that the other party induced him to enter into the contract by misrepresenting the nature of the subject-matter to him. But the formal basis of his common law right to rescind and claim damages is not the misrepresentation but the implied condition and undertaking that the subject-matter of the contract is of the same essential kind as is described in the contract.

§ 87. Invalidating Misrepresentation in Equity

Having considered the attitude of the common law towards misrepresentation inducing a contract it remains for us to examine the doctrine of equity on the matter. Here the leading decision is *Redgrave v. Hurd* (h), in which the Court of Appeal, in 1881, laid down a wide rule making no distinction between fraudulent and innocent misrepresentation in respect of their invalidating operations, and purporting to be a declaration of a settled principle of equity. In *Redgrave v. Hurd* a contract for the purchase of a house together with the goodwill of a business was rescinded on the ground of innocent misrepresentation by the vendor as to the value of the business. Jessel, M.R., speaks as follows: "As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which, of course, has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false" (i). The historical foundation for this proposition that in equity there was a general rule invalidating contracts for innocent misrepresentation would seem to be of the most unsubstantial nature (k). But, however this may be, the rule declared in *Redgrave v. Hurd* has since obtained repeated

(h) (1881), 20 Ch. D. 1.

(i) At p. 12.

(k) Cf. Ashburner, *Equity* (2nd ed.), 279.

judicial recognition. In respect of a contract of partnership it was recognised and applied by the Court of Appeal and the House of Lords in *Adam v. Newbigging* (l) in the years 1886 and 1888. In 1889, in *Derry v. Peek* (m), the case which established that innocent misrepresentation is not operative as a cause of action, it was expressly recognised by Lord Bramwell and by Lord Herschell that such misrepresentation is nevertheless operative to render voidable a contract induced by it. Lord Bramwell speaks of "the equitable rule that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission" (n). So Lord Herschell (o): "Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation, cannot stand". Similarly in *Lagunas Nitrate Co. v. Lagunas Syndicate* (p) in the year 1899 it is said by Lindley, M.R. (q): "A contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent" (r).

Notwithstanding doubts which have been expressed by learned writers it is thought that the new rule so formulated must be accepted as of general, though not perhaps invariable (s), application throughout the law of contract, and is not merely a special rule derogating from the common law in respect of particular classes of contracts, and that it has definitely superseded as to contracts in general the older rule of the common law which allowed rescission only in the case of fraud (t). This being so, all judicial authorities prior to *Redgrave v. Hurd* as to the effect of innocent misrepresentation on the validity of contracts are now to be read in the light of that decision, just as all the earlier authorities as to the effect of such misrepresentation as a cause of action are to

(l) (1888), 13 App. Cas. 308; (1886), 34 Ch. D. 582

(m) (1889), 14 App. Cas. 337.

(n) *Ibid.*, at p. 347.

(o) *Ibid.*, at p. 359.

(p) [1899] 2 Ch. 392.

(q) *Ibid.*, at p. 423.

(r) See also Lord Atkin, delivering the judgment of the Privy Council in *MacKenzie v. Royal Bank of Canada*, [1934] A. C. 468, 475.

(s) At p. 241, *post*.

(t) So Anson, *Contract* (18th ed.), 172; Pollock, *Contract* (10th ed.), 525, 555, (11th ed.), 432, 456, abandoning contrary opinion expressed in (9th ed.), 599, and earlier editions.

be read in the light of *Derry v. Peek* (u): The former decision successfully substituted a real or supposed rule of the Courts of equity for the established rule of the common law; the latter decision, on the contrary, re-established the authority of the common law as against the encroachment of an unauthentic equitable doctrine as to actionable misrepresentation not amounting to fraud.

§ 88. Relationship Between the Principles of the Common Law as to Misrepresentation and the Rule in *Redgrave v. Hurd*

Notwithstanding the successful establishment of the new doctrine of *Redgrave v. Hurd* it is still necessary to bear in mind for several reasons the distinction between fraudulent and innocent misrepresentation. For, in the first place, the former alone is a cause of action as opposed to a ground of contractual invalidity. In the second place, the remembrance of the distinction, as established at common law, is essential for the understanding and application of judicial decisions prior to *Redgrave v. Hurd*. In the third place the rule of *Redgrave v. Hurd* as to innocent misrepresentation has never been extended beyond the domain of contract so as to invalidate for innocent misrepresentation other acts in the law such as conveyances and grants. These still remain subject to the common law as to fraud exclusively. In the fourth place, it is not certain that the rule in *Redgrave v. Hurd* is of universal application to contracts of every description. In particular it may not apply to those branches of the law of contract which have been made the subject of statutory codification, such as the sale of goods. It may be that the law as so codified is the common law itself, without the importation of the equitable principle of invalidity because of innocent misrepresentation, and that the application of this principle is excluded by the true interpretation of the statute (x). Finally, it does not necessarily follow that, because innocent misrepresentation is now a ground of invalidity no less than fraud itself, the whole of the detailed rules of law as to invalidation for fraud are to be extended without qualification to cases of invalidation for innocent misrepresentation. It may well be that to some extent those rules require modification in their application to a new subject-matter. The authorities, however, as to

(u) (1889), 14 App. Cas. 337.

(x) *Riddiford v. Warren* (1901), 20 N. Z. L. R. 572; *Watt v. Westhoven*, [1933] Victorian L. R. 458.

invalidation for innocent misrepresentation are so scanty that it is not possible to ascertain to what extent, if at all, this is so.

It is further to be noted that the remedy for misrepresentation afforded by the new equitable principle is in addition to and not by way of substitution for any remedy which may exist at common law in virtue of the truth of the representation being the subject-matter of an express or implied contractual provision. The limitations on the equitable principle are such that in some cases a remedy for misrepresentation will still be sought on the basis of breach of contract. In the first place it appears that the rule in *Redgrave v. Hurd* does not apply to a contract which has been executed by the conveyance or grant of property or which is part of a mixed transaction including a conveyance or grant (y); but the operation of an appropriate contractual provision is not so restricted (z) and the remedy for the breach of such a provision (whether in the particular case that remedy is damages or rescission or both) may be had even after grant or conveyance (a). Secondly, *Redgrave v. Hurd* allows only of rescission; but a person induced by misrepresentation to enter into a contract may not desire to rescind it, but merely to recover damages in respect of the misrepresentation. In that event (unless the misrepresentation was fraudulent) he must still show that the truth of the representation was warranted and claim damages for breach of the warranty. Thirdly, the equitable rule required that the misrepresentation shall have been an inducing cause of the contract. It is true that when the misrepresentation proved is such as would naturally induce a contract of the kind actually made the proper presumption of fact is that the misrepresentation did induce the contract (b). But nevertheless it is always open to the defendant to offer evidence rebutting this presumption if he can. But the common law rule as to implied conditions is not so limited. If a contract is made expressly or impliedly on condition that such and such a fact exists, the non-existence of that fact is in itself sufficient to invalidate

(y) See p. 262, *post*.

(z) *Palmer v. Johnson* (1884), 13 Q. B. D. 351.

(a) *Street v. Blay* (1831), 2 B. & Ad. 456, 462; 109 E. R. 1212, 1214; *Bannerman v. White* (1861), 10 C. B. (N.S.) 844; 142 E. R. 685; *Behn v. Burness* (1863), 3 B. & S. 751, 755-6; 122 E. R. 281, 283; *Otto v. Bolton*, [1936] 2 K. B. 46. Rescission after grant or conveyance cannot be had, however, where the acceptance of the grant or conveyance amounts to the waiver by the party seeking to rescind of his right to do so. See p. 547, *post*.

(b) See p. 254, *post*.

the contract, irrespective altogether of the question whether a belief in its existence was an inducing cause of the contract (c).

§ 89. Measure of Damages for Fraud and Breach of
Contract Respectively

We have seen that at common law damages in tort may be recovered for fraudulent misrepresentation; and further that where the truth of a misrepresentation, whether fraudulent or not, is expressly or impliedly warranted, damages for breach of warranty may be obtained. It should be noticed, however, that damages are not assessed on the same principle in these two cases. Damages in tort, in so far as they are substantial and not merely nominal, are intended to place the injured party in the position in which he would have been had the tort not been committed (d). On the other hand, substantial damages in contract are intended to place the injured party in the position in which he would have been had the contract been duly performed (e). Where a party may claim either for deceit or for breach of contract, these different principles will sometimes produce the same result; but sometimes they will produce different results. Thus suppose that A, in the course of negotiating for the sale of his motor-car to B, fraudulently represents that it has been driven only 8,000 miles, the truth, known to A, being that its mileage is 20,000, and by this fraudulent representation induces B to buy the car for £250. Suppose further that the car is actually worth £225, but would have been worth £250 if it had travelled only 8,000 miles. On these facts, if B affirms the contract and claims damages it will not matter whether he recovers in tort or (assuming a warranty as to the truth of the representation) in contract. In either case the damages will be £25. If, however, the car, instead of being in its actual condition worth £225 were worth £250, and would have been worth £275 if it had done only the mileage represented, the position would be different. Nothing could be recovered for fraud, for B, having paid £250 for a car worth £250, would have suffered no loss. If, however, he could sue for breach of warranty he would recover £25, for in this case the question would be not what B had lost, but

(c) *Condogianis v. Guardian Assurance Co.*, [1922] 2 A. C. 125, 129; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, 421; *Zurich Insurance Co. v. Morrison*, [1942] 1 A. E. R. 529, 539.

(d) *Liesbosch Dredger v. S.S. Edison*, [1933] A. C. 449, 459; Halsbury, *Laws of England* (2nd ed.), vol. 10, pp. 82-3.

(e) *Robinson v. Harman* (1848), 1 Ex. 850, 855; 154 E. R. 363, 365; see p. 583, *post*.

how much more he would have had if the warranty had not been broken.

§ 90. Further Development of the Discussion

We have now traced the elements going to make up the modern law regarding the effect of misrepresentation on contracts induced thereby. The most important part of this law is that dealing with misrepresentation, whether innocent or fraudulent, operating directly on the contract as an external cause of the invalidity thereof and not indirectly as being the subject-matter of an express or implied term of the contract; and it is misrepresentation as an external cause of contractual invalidity that we shall now proceed to examine in more detail. First we shall consider more fully the nature of fraudulent, as distinguished from innocent, misrepresentation; and then attempt to state, as far as may be done in the present condition of the authorities, the similarities and differences in the operation of the two kinds of misrepresentation as external causes of contractual invalidity.

§ 91. Fraud (f)

The usual form of a fraudulent misrepresentation is a statement known to be false by him who makes it. Such knowledge, however, is not essential. What is really essential is the absence of any genuine belief in the truth of the statement. He, and he only, is guilty of fraud who makes a statement without believing it to be true. It is immaterial whether he knows it to be untrue, or merely knows that he is ignorant or doubtful whether it is true or not (g). This principle is often expressed by saying that a fraudulent statement is one which a person makes either (1) knowing it to be untrue, or (2) recklessly, not caring whether it is true or not. But such a reference to recklessness and carelessness in this connection is a fertile source of confusion of thought. It suggests that negligence may be equivalent to fraud. This is not so, for these two states of mind are mutually exclusive. No one can make a statement fraudulently who makes it carelessly or negligently (h). Nor does the law recognise in this connection any

(f) For a compendious statement of what constitutes fraud at common law, see *per Viscount Maugham* in *Bradford Building Society v. Borders*, [1941] 2 A. E. R. 205, 211.

(g) *Taylor v. Ashton* (1843), 11 M. & W. 401; 152 E. R. 860; *Smith v. Chadwick* (1884), 9 App. Cas. 187, 203; *Derry v. Peek* (1889), 14 App. Cas. 337, 366.

(h) "Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design": *Fry, J., Kettlewell v. Watson* (1882), 21 Ch. D. 685, 706.

form of constructive fraud which is in reality merely negligence. When, therefore, it is said that a statement is fraudulent if made "recklessly, not caring whether it is true or false", what is really meant is that a statement is fraudulent if made without any genuine belief in its truth (i). If, however, such a belief does exist, it is immaterial that it may have been formed carelessly and on insufficient grounds. As already indicated, the law requires all men to be honest in their statements to others, but does not require them to be careful, save in special cases where such a duty is imposed for special reasons (k).

The absence of any adequate grounds for a belief, or of any adequate care in the investigation of the facts before making the statement, may in certain cases be a good reason for the inference that no such belief existed. *Magna culpa dolus est*, said the Roman lawyers, and the maxim is true in English law also if read as meaning that a plea of mere negligence, as opposed to fraud, may be properly disbelieved in cases where such negligence would be so gross as to be incredible (l).

The doctrine that the test of fraud is the absence of genuine belief in the truth of the representation may be otherwise expressed as follows: On a question of fraud every statement, whatever its form, is to be judged and tested as a statement of the belief of the person making it. The statement that the fact is so-and-so means in the law of fraud "I believe the fact to be so-and-so". If, as so read, the statement is false, it is also fraudulent; if true, it amounts only to innocent misrepresentation. The test is subjective, not objective. Now it is to be observed that belief may exist in different degrees. It may vary from absolute knowledge and certainty downwards through divers stages of doubt and hesitation. A man may with sure and certain knowledge believe that yesterday he travelled from York to London. He may believe, with full recognition of the treacherous nature of his memory and the resulting possibility of error, that he did the same in July three years ago. He may believe that he is in good health, and may inform an insurance company accordingly, and yet may be fully conscious of the possibility that, unknown to himself, he may be suffering from some serious disease. This being so, what degree and measure of belief is necessary to prevent an erroneous statement from being classed by the law as fraudulent? The answer

(i) Lord Herschell, *Derry v. Peek* (1889), 14 App. Cas. 337, 374.

(k) *Ibid.*, pp. 368-75; *Angus v. Clifford*, [1891] 2 Ch. 449

(l) *Ibid.* 375-6; *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 500.

statement is in the first form relating to objective fact it must be objectively true, otherwise the contract is invalidated by innocent misrepresentation. But if his statement is in the second and subjective form—if it relates only to his belief or opinion—it is sufficient if it is subjectively true. It is enough if he really has the belief or opinion which he says he had. If so, there is no innocent misrepresentation invalidating the contract, even though the belief or opinion so held and expressed by him is wholly erroneous. In the case of innocent misrepresentation, therefore, it is necessary to draw a distinction which is irrelevant in respect of fraud—the distinction between a representation of objective facts and a representation of subjective belief, opinion, or expectation with respect of such facts. A representation of fact amounts to operative misrepresentation if the facts are not in truth as represented to be. But a representation of belief, opinion, or expectation is not a misrepresentation merely because the belief or opinion or expectation is unfounded and erroneous. It invalidates the contract only if such belief, opinion, or expectation does not in truth exist.

A representor who innocently makes a misrepresentation and afterwards and before it is acted upon by the representee learns of the true facts will be guilty of fraud if thereafter he does not take reasonable steps to correct his erroneous statement but leaves the representee to act in reliance upon it. So where a representation, true when made, is afterwards, and before the representee has acted upon it, falsified to the knowledge of the representor by subsequent events the representor will be guilty of fraud if he does not take reasonable steps to inform the representee of the changed circumstances (*n*). Where the change of circumstances does not become known to the representor before the representee acts on the representation the case will be merely one of innocent misrepresentation (*o*).

§ 92. Representation as to Matters of Fact

It is sometimes said that operative misrepresentation must be a representation of *fact*. If by this term is meant objective fact

(*n*) Salmond, *Torts* (10th ed.), Ch. XVIII. As to whether a person is guilty of fraud who, though not a party to a fraudulent representation when originally made, afterwards learns of it and deliberately and knowingly uses the delusion created in the representee's mind by allowing the representee to contract or otherwise act under its influence, see *per* Lord Wright in *Bradford Building Society v. Borders*, [1941] 2 A. E. R. 205, 220.

(*o*) *With v. O'Flanagan*, [1936] Ch. 575.

as opposed to subjective belief, opinion, expectation or intention, the proposition is not true. "The state of a man's mind is as much a fact as the state of his digestion" (p), and a misrepresentation of either class of fact may be equally operative whether as a cause of action or as invalidating a contract. A man may defraud another by misrepresenting his opinion about things, no less than by misrepresenting the things themselves (q). So also he may deceive another by misrepresenting his intention. If, indeed, he genuinely entertained the intention at the time, and only subsequently abandoned it, he will be liable, if at all, only in contract (r). He will have made a promise which he has failed to perform. But if he did not entertain the intention at all his statement that he did would be fraudulent (s). If, in any particular case, a misrepresentation of the state of a man's mind is not legally operative, the reason is not that the law of misrepresentation is in any manner limited to objective facts, but merely that a statement of belief or opinion is less likely to have been relied on by the representee than a positive statement of fact (t). But if it was relied on and was made for that purpose it is no less effective in law than if it was a positive misrepresentation of the facts themselves. If, on the other hand, the proposition that a misrepresentation must be one of fact is intended to include both objective and subjective facts, the proposition is idle, for these two classes of facts include all the things about which any representation could possibly be made.

It is sometimes suggested that by the proposition in question fact is opposed to law, and that a misrepresentation of law is destitute of legal effect. This suggestion is, however, contrary to principle, and is thought to be unsupported by authority (u). It is certainly possible in fact for one man to deceive and defraud

(p) Bowen, L.J., in *Edgington v. Fitzmaurice* (1885), 29 Ch. D., at p. 483.

(q) Cf. Bowen, L.J., *Angus v. Clifford*, [1891] 2 Ch. 449, 470. See *Bisset v. Wilkison*, [1927] A. C. 177, 181-3.

(r) *Jorden v. Money* (1854), 5 H. L. C. 185; 10 E. R. 868.

(s) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459; *Bristol (Earl of) v. Wilmore* (1823), 1 B. & C. 514; 107 E. R. 190; *Re Eastgate*, [1905] 1 K. B. 465.

(t) Cf. Bowen, L.J., *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, 362. The principles stated in the text explain those cases in which it has been held that a mere commendatory, or puffing, description has not amounted to a misrepresentation. Either the description purported to be a statement of opinion which was not shown not to have been entertained by the representor (cf. *Bisset v. Wilkison*, *supra*); or else it was such that in all the circumstances no reasonable person in the position of the representee would have taken it literally and relied upon it (cf. *Dimmock v. Hallett* (1866), L. R. 2 Ch. 21, 27). See Anson, *Contract* (18th ed.), 191; Pollock, *Contract* (11th ed.), 449.

(u) See *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360; *Eaglesfield v. Marquis of Londonderry* (1877), 4 Ch. D. 693; *Derry v. Peek* (1889), 14 App. Cas. 337; and *Beattie v. Lord Ebury* (1872), L. R. 7 Ch. 777.

another by wilfully misrepresenting the law to him; and there seems to be no reason why fraud of this kind should be the subject of a special exemption from liability. It is true that every man is presumed to know the law, and that a plea of ignorance or mistake of law will not be listened to in the Courts for any purpose. But to be ignorant of the law is surely a different thing from being wilfully deceived as to it.

§ 93. Misrepresentation and Non-Disclosure

Misrepresentation, whether fraudulent or innocent, is to be distinguished from mere passive non-disclosure by a contracting party of facts known to him but not to the other party. To pervert the truth is one thing, not to disclose it is another. The law distinguishes sharply between *suggestio falsi* and mere *suppressio veri*. Every man who is minded to contract with another is bound not to mislead him by erroneous statements; but he is commonly under no obligation to enlighten him as to matters in respect of which he is ignorant or as to which he is under some misapprehension, however material those matters may be to his interests, and even though his ignorance or misapprehension is well known to the other party. In general, the law recognises that each contracting party is entitled to the benefit of his own knowledge and is not bound to share it with the other, but, on the contrary, is at liberty to take full advantage of the ignorance and error of that other so long as he has not himself induced it by erroneous statements (x). Though he well knows that the company in which he is a shareholder is insolvent he may lawfully sell his shares to any one who is ignorant enough to be willing to buy them (y).

This general rule that *suppressio veri* is immaterial and inoperative in the law of contract is subject, however, to certain exceptions. There are certain classes of contracts in which the parties are not at liberty thus to deal with each other at arm's length and take such advantage of each other as their superior knowledge enables them to achieve. In such contracts there is, in addition to the ordinary duty of avoiding positive misrepresentation, the special duty of positive disclosure of all material facts known to the one party but not to the other, with intent that both parties shall before entering into the contract be placed on an equal footing in respect

(x) *Bell v. Lever Brothers, Ltd.*, [1932] A. C. 161; *Fletcher v. Krell* (1873), 42 L. J. Q. B. 55.

(y) As to non-disclosure in a *prospectus* see p. 276, *post*.

of all relevant facts. A breach of this duty of disclosure invalidates the contract, just as positive misrepresentation does. Contracts to which this special rule applies may be distinguished as contracts of *good faith*. They are sometimes referred to as contracts *uberrimæ fidei*. These contracts of good faith will be dealt with in a later chapter. It is sufficient here to say that they are of two kinds: first, those in which the duty of disclosure is based on the special character of the contract itself; and, second, those in which the duty is based on the existence of some special relation of confidence, authority, or influence antecedently existing between the parties to the contract. Contracts of insurance are examples of the first class; contracts between a trustee and his beneficiary are examples of the second (z).

In applying this distinction between misrepresentation and mere non-disclosure—between *suggestio falsi* and *suppressio veri*—it is to be remembered that to state only part of the truth is very often to state by implication a falsehood. Often it is impossible to tell the truth without telling the whole truth. And this for at least two reasons. In the first place, the part undisclosed may be a qualification of the part disclosed: to quote only part of the report of experts upon the prospects of a mining venture is to make a false representation if the part suppressed qualifies in any manner the part disclosed, although the quotation is literally accurate and therefore in this sense perfectly true. In the second place, a statement of part is often by implication a representation that the part is the whole, and that there is nothing more to disclose. *Expressio unius exclusio alterius* is not merely a maxim of the law, but a recognised principle of common speech (a).

Mere passive non-disclosure of the truth must also be distinguished from the active concealment of it with intent to prevent its discovery and to create a false belief in the opposite. This is fraud no less than if a positive misrepresentation had been made in so many words (b). He who offers a house for sale is not bound to disclose that the timbers are decayed or a wall is cracked, but he is none the less guilty of fraud if by means of paint and plaster or otherwise he covers up these defects with intent to prevent the purchaser from discovering them for himself. For he

(z) *Bell v. Lever Brothers, Ltd.*, [1932] A. C. 161, 227, 232.

(a) *Peek v. Gurney* (1873), L. R. 6 H. L. 377, 392, 403; *Arkwright v. Newbold* (1881), 17 Ch. D. 301, 318; *R. v. Kylsant*, [1932] 1 K. B. 442.

(b) *Schneider v. Heath* (1813), 3 Camp. 506; 170 E. R. 1462.

thereby represents by his conduct, though not by words, that these defects do not exist (c).

§ 94. Inducement

In order that a misrepresentation, whether fraudulent or innocent, should invalidate a contract it is necessary that it should have actually operated on the mind of the contracting party as an inducement to the making of the contract. In other words, he must have relied on the representation made to him and have contracted on the faith of it and because of his belief in its truth. If at the time when he made the contract he did not actually know of the representation, or did not believe it (d), or if, though he knew of it and believed it, it had no effect on his mind as an inducing cause of the contract (e), the representation, even though fraudulent in intent, is neither actionable nor invalidating. This proposition, however, that misrepresentation is operative only if it was an inducing cause of the contract is one of ambiguous import and calls for careful examination. Here, as elsewhere in the law, the idea of causation is one that involves difficulty and obscurity in its analysis and application. A man may have, and, indeed, commonly has, more than one reason or inducement for entering into a contract. One of these may be his belief in some representation made to him by the other party, but he may have other reasons at the same time. Now, it is well settled, and, indeed, is obvious from first principles, that the rule as to the necessity of inducement does not mean that misrepresentation must be the sole operative reason or cause of the contract. It may be merely part of the inducement. It may be merely one of several matters operating conjointly on the mind of the representee at the same time and leading him to make the contract. Further questions, however, remain to be asked and answered. Although the misrepresentation need not be the sole inducing cause of the contract, must it amount in itself to a *sufficient* inducing cause in the sense that it would have operated by itself had the other inducements been absent? This question is answered in the negative by *Edgington v. Fitzmaurice* (f), where the plaintiff succeeded

(c) *Pickering v. Dowson* (1813), 4 Taunt. 779, 785; 123 E. R. 537, 540; Sugden, Vendors and Purchasers (14th ed., 1862), p. 335.

(d) *Wasteney v. Wasteney*, [1900] A. C. 446.

(e) *Attwood v. Small* (1838), 6 Cl. & F. 232; 7 E. R. 684. See Jessel, M.R.'s, exposition of this case in *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 14.

(f) (1885), 29 Ch. D. 459.

in a claim based on actionable misrepresentation by which he was induced to take debentures from a company, although he admitted that, notwithstanding the representation on which he had relied, he would not have taken the debentures unless he had been under a mistaken belief, not induced by any misrepresentation, that they conferred a charge on certain property. It is said by Cotton, L.J. (g) : "It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to show that the misstatement was the sole cause of his acting as he did:"

Misrepresentation as a Necessary or Indispensable Part of Inducement. It is established, therefore, that although a misrepresentation must be an inducing cause of the contract it need not be the *sole* inducing cause, and need not even be in itself a *sufficient* inducing cause so as to be capable of operating by itself without the cumulative aid of others. Yet there still remains a further question. Although the representation may be only a part of the inducement to the contract, is it requisite that it should be a necessary or indispensable part of it in the sense that in the absence of that representation the contract would not have been entered into—the remaining inducements not being sufficient by themselves? Or is it, on the contrary, enough that the representation actually contributed its weight to the sum total of the influences operating in the mind of the contracting party, even though these other influences would have been sufficient by themselves? A cart may be drawn up a hill by four horses although three of them could have done it by themselves. The fourth horse is an inducing cause of the progress of the cart, for he contributes his pull to the result; but he is neither the sole cause, nor a sufficient cause, nor a necessary cause. If the load is so increased that it takes four horses to take it up the hill, the fourth horse becomes a necessary part of the inducement, for without him the cart would stand still. In the question which has been formulated the cart is the contract, and the fourth horse is the fraudulent or innocent misrepresentation of the other contracting party.

In *Smith v. Kay* (h) the question is thus answered by Lord Wensleydale : "I take it to be perfectly clear that, in order to set

(g) At p. 481.

(h) (1859), 7 H. L. C. 750, 775-6.

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aside a deed on the ground of fraud, there must be moral fraud, and fraud causing the contract *dolus dans causam contractui*; not necessarily a fraud which is the sole cause of the contract, but a fraud without which the contract never would have been made . . . Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only when it is the ground of the contract, and where, unless it had been employed, the contract would never have been made."

If this is still to be accepted as an authentic statement of the modern law on this point, misrepresentation has no effect if it is only the fourth horse and if the cart would have equally gone up the hill with the other three. The question, however, cannot be regarded as definitely decided, for it is difficult to reconcile the foregoing statement of Lord Wensleydale with certain later judicial utterances. It is not infrequently said or implied that a misrepresentation is operative if it formed a real and material part of the inducement, without any evidence that it was an essential and indispensable part, so that in its absence the contract would not have been entered into. Thus in *Re London and Leeds Bank* (i), a decision of Stirling, J., the headnote of the report, which seems accurately to express the *ratio decidendi*, is as follows: "Where a person seeks to rescind a contract to take shares on the ground of misrepresentation, it is not necessary that he should prove that if the misrepresentation had not been made he would not have taken the shares. It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation."

On principle, apart from authority, it would seem illogical to give a plaintiff damages for being led into a contract by fraud if he would have made the same contract in any event even if no such fraud had been practised on him. For in such a case the fraud has not been in truth the cause of any loss to him. But when the question relates not to damages but to the validity of the contract such a consideration is not in point. It would be quite logical to hold that a contract was invalid in every case in which misrepresentation, whether fraudulent or not, was actually operative as one of the inducing causes of it, even though not as an indispensable and essential cause. It is possible, therefore, that the law may develop a distinction in this respect between actionable and invalidating misrepresentation. In any case, even if the rule as formulated by Lord Wensleydale is accepted as of

(i) (1887), 56 L. J. Ch. 321.

general application, its practical operation is restricted by rules as to presumption and proof. Where a representation is of such a nature that it will naturally and probably induce a contract, and a contract is thereupon actually entered into, it is commonly a proper presumption of fact that the representation was the inducing cause of the contract. In such a case it is not necessary for the plaintiff seeking rescission or damages to prove affirmatively that the representation was in truth the operative and essential cause of the contract. The burden of proving that it was not, and that the plaintiff would have made the contract in any event, may properly be left to be borne by the defendant. In most cases it will be impossible for the defendant to engage successfully in any such speculative inquiry as to what the plaintiff would or would not have done on the hypothetical assumption that the erroneous representation had never been made to him. In *Smith v. Chadwick* (k) it is said by Lord Blackburn: "In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shows damage; if he did not, he shows none. And I think the plaintiff in such a case must not only allege but prove this damage. . . . I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. . . . I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement" (l). It must often be impossible for the plaintiff himself to answer definitely, especially after a lapse of time, the question whether he would or would not have entered into the contract if the particular representation had not been made to him; but it is easy to answer the question whether the representation was or was not one of the inducing causes of the contract (m).

It must also be understood that the question whether the

(k) (1884), 9 App. Cas. 187, 195-6

(l) Cf. Cardozo, J., in *De Cicco v. Schweizer* (1917), 221 N. Y. 431, quoted p. 121, n. (b), *ante*.

(m) See the observations of Lord Halsbury, L.C., in *Arnison v. Smith* (1889), 41 Ch. D. 348, 369, and of Byrne, J., in *Drincqubier v. Wood*, [1899] 1 Ch. 393, 404.

plaintiff would or would not have entered into the contract if the misrepresentation had not been made to him does not mean "Would he have entered into that contract at all or on any terms?" but means "Would he have entered into it on the terms to which he actually agreed?" A purchaser may be induced by fraud to give £1,000 more for the land than he would otherwise have given; but even in the absence of any misrepresentation he might have been ready and willing to buy the land, though not at that price. In such a case the contract is wholly invalidated by the misrepresentation, even though it operated only on one of the terms thereof, however subordinate and unimportant that term may be.

Representee's Right to Rely on Misrepresentation. If an erroneous representation is actually relied on as the inducement of the contract, it is no answer, either to a claim for damages or to a claim for rescission, that the party so misled had the means of discovering the truth of the matter for himself, and ought to have used those means, and therefore has only himself to blame. He was under no such duty of doubt or of inquiry. Every one is entitled to believe without scrutiny whatever representations are made to him for the purpose of inducing him to enter into a contract with him by whom they are made. Even if he does make inquiry into the truth, but does not discover it, he can still rescind the contract for misrepresentation. The making of such inquiry may, indeed, be evidence that he did not rely on the representation made to him, but trusted to his own judgment exclusively; but it is not conclusive to this effect (n).

§ 95. Who is Entitled to Rely on a Representation Made by Another

In order that a representation should be operative as actionable or as invalidating, it is not enough that it should have been made by one party and relied and acted on by the other. If this were all that the law required, a man would, for all lies and erroneous statements emitted by him, be liable without restriction to any member of the public who chose to rely and act on them. He who overheard X telling a lie to Y would be entitled to act in reliance on it and to sue X for any resulting loss so incurred by him. But this is not the law. He who turns loose a lie into the world is not legally responsible for all its subsequent adventures

(n) *Redgrave v. Hurd* (1881), 20 Ch. D. 1.

as if he had turned loose a wild beast. There must exist between the parties some direct relation of such a nature as is sufficient, in the view of the law, to entitle one of them to rely and act on the statements of the other and to claim redress for their erroneous nature. It is not easy, however, to ascertain the precise nature of the limitation so imposed upon the operative effect of misrepresentation. Before considering the question the rule may be conveniently illustrated by reference to the leading case of *Peek v. Gurney* (o). In this case the plaintiffs had purchased shares in the market from the holders thereof in reliance on a fraudulent prospectus issued by the directors of the company, and on the insolvency of the company the purchasers sued the directors for damages for the loss so suffered by reason of this fraud. It was held by the House of Lords that the plaintiffs had no cause of action. The purpose and function of the prospectus was to induce applications for the issue of shares by the company itself, not to induce the purchase from shareholders of shares already issued. The prospectus was a representation and invitation addressed to persons intending to deal with the company, not to persons intending to purchase shares in the market. If persons to whom it was not addressed chose to rely and act on it for a purpose for which it was not intended, they did so at their own risk and had no cause of action against the directors who issued it.

What, then, is the precise nature of the limitation thus imposed on the operative effect of misrepresentation? It may be that a distinction is to be drawn in this respect between fraud and innocent misrepresentation. Where it is necessary for the representee to rely on fraud, it is probably correct—at all events, since *Derry v. Peek* (p)—to say that the representor must have intended his false statement to be relied on by the person or a class of persons including the person (q) who did rely on it and complains of being deceived thereby. *Quoad* some different person, fraud is presumably inoperative. It may be that the representor ought to have contemplated that another person might be naturally and reasonably misled by reliance on his fraudulent statement; but to hold him responsible to that other person would be to hold him responsible for negligence rather than for fraud, contrary to the rule in *Derry v. Peek* (r). He who intends to deceive A but in the

(o) (1873), L. R. 6 H. L. 377.

(p) (1889), 14 App. Cas. 337.

(q) *Bradford Building Society v. Borders*, [1941] 2 A. E. R. 205, 211.

(r) (1889), 14 App. Cas. 337.

result deceives B instead is guilty *quoad* B of negligence at the most and not of fraud.

What shall be said, however, if he intends that A shall act in reliance on his statement, but A acts upon it in a manner different from that which was intended? Presumably in such a case liability should exist notwithstanding *Derry v. Peek*, except in cases where the person so deceived acted in a manner which he had no right to suppose to be intended by the representor, and where, therefore, the person so acting had only himself to blame. He who wilfully and intentionally deceives another should on principle be held liable for the results of any action so resulting which is the natural and reasonable outcome of the state of mind thus fraudulently induced.

So much for the case of fraud. But what shall be said of a case in which fraud does not exist or is not essential, and in which the representee seeks merely to repudiate a contract on the ground that he was induced to enter into it by the misrepresentation of the other party? In this case it is thought that the actual intention of that other party in making the representation is not the true test. The real question, it is thought, is whether the representation is of such a nature, and is made in such circumstances, that the party acting on the faith of it believed on reasonable grounds that it was made to him with intent that he should so accept and act on it as an inducement to the contract. If he did not so believe, or had no reasonable grounds for so believing, there seems no reason why he should be allowed to repudiate the contract merely because in fact he made it in reliance on that representation. If, on the other hand, he believed on reasonable grounds that the representation was held out to him and not to another, and was intended as an invitation and inducement to the contract, the representor ought to be estopped from pleading that this was not in truth his own intention. Just as he who makes an offer is bound by a valid contract to any person who accepts that offer in the sense in which it was naturally and reasonably understood by him, so he who makes an erroneous representation which induces a contract should be held bound by that representation as meaning what it was naturally and reasonably understood to mean by the other party.

§ 96. Exclusion of Liability for Misrepresentation

The rule that a contract is voidable if induced by innocent misrepresentation is not a peremptory rule which prevails over the intention of the parties, and it may be effectually excluded by

an express term to the contrary contained in the contract. That is to say, one party may, in and by his contract, say to the other : “ Although I have made to you certain statements relative to the subject-matter of this contract for the purpose of enabling you to determine whether you will enter into it or not, you are not to be entitled to hold me responsible for any error in those statements or to repudiate the contract on the ground of any such error. On the contrary, you must ascertain the truth for yourself, and if you choose to accept the statements which I have so made for your information you will do so at your own risk and not at mine.” In such a case, even though the representations so made are in fact erroneous, and although they may in fact have been relied on by the representee and induced the contract, the representee has nevertheless no right of rescission. Thus in *Boyd & Forrest v. Glasgow Railway Co.* (s) a contract for the construction of a railway was induced by material, though honest, misrepresentations by the railway company as to the nature of the substrata of the ground on which the railway was to be built, the result of this error being that the construction was much more expensive to the contractor than it would have been had the assurances of the railway company been correct. But the contract contained an express provision to the effect that the railway company was not to be responsible for any such errors, and it was held by the House of Lords that on this ground, *inter alia*, the contract could not be rescinded (t). It seems, however, that on the ground of public policy this rule is limited to innocent misrepresentation, and that a term excluding rescission or responsibility for fraud would be void. A general clause relative to error will be construed as limited to honest error (u).

§ 97. Materiality

It is often said that misrepresentation, in order to constitute a ground of invalidity, must be *material*. If a material misrepresentation means in this connection one which did in fact induce the contract, this is merely another way of stating the general principle of inducement already explained. If, on the other hand, a material misrepresentation means one which is in its nature antecedently likely and calculated to induce the contract, and if materiality in

(s) (1915), S. C. (H. L.) 20

(t) See also *Arnison v. Smith* (1889), 41 Ch. D. 348; *S. Pearson & Son, Ltd. v. Dublin Corporation*, [1907] A. C. 351.

(u) *Boyd & Forrest v. Glasgow Ry.*, [1915] S. C. (H. L.) 20. See also *S. Pearson & Son, Ltd. v. Dublin Corporation* (*supra*)

To the rule that a contract is not invalidated by misrepresentations made by a stranger to it there are at least two exceptions.

In the first place, if the misrepresentation is such as to produce *error in consensu* as to the terms or nature of the contract or as to the identity of the parties to it, as opposed to mere *error in causa* operating as an inducement to the contract, it makes no difference (subject only to the rule of estoppel) whether the representation is made by a party or by a third person. The contract is void in either case (a).

In the second place, a representation made even by a stranger may be of such a nature that its truth is an express or implied conventional condition of the contract. If a contract is expressly or impliedly made on the condition that the facts are so-and-so, it is voidable if they are otherwise; and it makes no difference whether the erroneous belief was induced by a party or by a stranger or was self-induced. Thus in *Karberg's Case* (b) a contract to take shares from a company was induced by erroneous statements contained in a prospectus issued by the promoters before the incorporation of the company. The company was, therefore, not itself a party to the misrepresentation so made before it came into existence. Nevertheless, since the application for the shares was made on the basis of the erroneous prospectus, the contract to take them was held voidable for breach of an implied condition that the statements of the prospectus were correct (c).

§ 99. Effect of Misrepresentation After Completion by Conveyance or Grant

Fraud invalidates not merely an executory contract, but also any conveyance, grant, or other disposition of property made by or

makes the contract"; Viscount Haldane, L.C., in *Mair v. Rio Grande Rubber Estates, Ltd.*, [1913] A. C. 853, 862; and *Refuge Assurance Co., Ltd. v. Kettlewell*, [1907] 2 K. B. 242; [1908] 1 K. B. 545; [1909] A. C. 243. Consider, however, *Newlands v. National Employers' Accident Assn., Ltd.* (1885), 54 L. J. Q. B. 428. In so far as the agent was also a servant of the principal and in making the fraudulent statement acted within the scope of his employment the principal will be liable in deceit for any damage resulting to the defrauded party by reason of the agent's fraud. Salmond, *Torts* (10th ed.), 94. So also the principal will be liable if he authorised or ratified the statement knowing its fraudulent character. As to the position where the elements required to constitute fraud are distributed between the principal and the agent or between two or more agents or servants, see *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.*, [1936] 2 A. E. R. 1039, as explained in *Anglo-Scottish Beet Sugar Corporation, Ltd. v. Spalding U. D. C.*, [1937] 2 K. B. 607.

(a) *Baillie's Case*, [1898] 1 Ch. 110; *Humphrey and Denman, Ltd. v. Kavanagh* (1925), 41 T. L. R. 378. See also *Moss v. Moss*, [1897] P. 263.

(b) [1892] 3 Ch. 1.

(c) See also p. 247, n. (n), *ante*.

North Western Railway Co. (f) the Exchequer Chamber, speaking of a contract for the sale of goods, says: "The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property."

But although in equity, and by way of a suit for rescission, relief can be obtained even though the contract has been executed by the passing of a legal estate or interest in the subject-matter of the voidable contract, this equitable rule is limited to cases of fraud, and does not extend to cases of innocent misrepresentation. That is to say, the modern rule in *Redgrave v. Hurd* (g) to the effect that innocent misrepresentation is enough to invalidate a contract has never been extended to conveyances, grants, and other dispositions of property, even though made in pursuance of a contract which is thus itself invalidated. Thus he who has been induced by innocent misrepresentation to sell his land, or to grant a lease, or to sell his shares in a company, may rescind that contract while it still remains executory; but he cannot do so after the contract has been executed by the conveyance of the land, or the grant of the lease, or the registration of the transfer of the shares (h). The rule that fraud is essential for relief in such cases was established long before *Redgrave v. Hurd* (i) succeeded in establishing a different rule in respect of executory contracts, and it has survived the establishment of that rule (k). The rule, however, that an executed conveyance or grant cannot be set aside for innocent misrepresentation has no application to cases in which there exists some other ground of invalidity, even though falling short of fraud—for example, a breach of trust or other fiduciary relation between the parties (l).

§ 100. Rescission by Act of the Party and by Judicial Decree

The right of rescinding a contract or other transaction voidable for misrepresentation may be exercised in two distinct ways. Such

(f) (1871), L. R. 7 Ex. 26, 31

(g) (1881), 20 Ch. D. 1. See pp. 239, 241, *ante*.

(h) *Angel v. Jay*, [1911] 1 K. B. 666; *Seddon v. N. E. Salt Co.*, [1905] 1 Ch. 326; *Armstrong v. Jackson*, [1917] 2 K. B. 822; *Soper v. Arnold* (1888), 37 Ch. D. 96.

(i) (1881), 20 Ch. D. 1.

(k) The restriction of the rule in *Redgrave v. Hurd* to executory contracts is strongly attacked in 55 L. Q. R. 90, where the authorities are examined in detail.

(l) *Armstrong v. Jackson*, [1917] 2 K. B. 822.

rescission may be effected either by the act of the party himself or by a judicial decree obtained by him in a suit for rescission. Rescission by the act of the party himself is nothing more than an act of election, whereby he chooses between rescinding the contract and confirming it, and intimates his election, by words or conduct, to the other party. The result is the automatic and immediate dissolution of the contract *ab initio*. In a suit for rescission, on the other hand, the operative act is not that of the party, but that of the Court itself, which by judicial decree rescinds the contract and makes such consequential orders as are necessary for the adjustment of the rights and obligations of the parties.

The common law recognised only one of these two modes of rescission—namely, rescission by act of the party. The Courts of common law knew nothing of suits for rescission. Equity, however, recognised rescission in both modes. In a proper case it followed the common law in permitting the party to rescind the contract by his own act. In other cases it supplemented the common law by exercising judicial authority to rescind the contract by decree in that behalf.

A suit for rescission, properly so called, must be distinguished from a suit in which the plaintiff claims merely a declaration that the contract has already been validly rescinded by the act of the party himself. Where the right of rescission is disputed, or rescission by the act of the party is not accepted by the other party, it may be advisable for the rescinding party to initiate legal proceedings for the authoritative determination of his rights in the matter. A decree made in his favour in such a suit is not in its true nature an operative decree of rescission by the Court; it is an authoritative declaration of the validity of a rescission already effected by the act of the party himself. It takes effect accordingly as from the date of that rescission, and not from the date of the decree itself.

§ 101. Rescission and Restitutio in Integrum

Rescission at Common Law. In the case of rescission by act of the party the common law imposed upon the exercise of this right restrictions far more rigid than those which applied in equity to the right of rescission by judicial decree. So long, indeed, as the contract remained wholly executory, there was no difficulty even at common law. Nothing having been done under the contract, rescission would not involve any consequential adjustment of the

rights and obligations of the parties. The only result of rescission in such a case was to cancel and dissolve the contract *ab initio*, and the rights and obligations of the parties were thereafter the same as if it had never been made. In such a case, therefore, even the common law permitted unrestricted liberty of rescission by the act of the party. Where, however, the contract had been already wholly or partially executed, the rescission of it by the act of the party was calculated to lead to grave difficulties with which the rules and remedies of the common law were ill-fitted to deal. The common law recognised that on the rescission of an executed or partly executed contract each party was justly entitled to *restitutio in integrum*—to get back, that is to say, whatever he had given under the contract and to be put in the same position in other respects as if the contract had never been made. Now, in many cases the enforcement of such restitution was impracticable in view of the very limited resources of common law procedure in this respect. The common law solved this difficulty by a rough-and-ready rule. It laid down the principle that rescission of an executed or partly executed contract could not be permitted in any case in which it was impossible for the other party to enforce and obtain *restitutio in integrum*. In such a case the party claiming to rescind was compelled to rely exclusively on his other remedy—namely, an action for damages for any loss suffered by him through the fraud by which he had been induced to enter into the contract. The contract stood, and complete justice was done between the parties by adjusting their rights and obligations on the basis of pecuniary compensation. “When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when the party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract. . . . That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price; but how could that be consistently with

justice?" (m). Similarly, it has been said: "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages" (n).

The practical result of this rule that a contract cannot be rescinded by one party if it is impossible for the other party to obtain *restitutio in integrum*, clearly depends upon the extent and efficacy of the judicial remedies which are available for the purpose of such *restitutio*. At common law those remedies were of the most imperfect description, and in consequence the rule in question had the effect in the Courts of common law of imposing rigid and far-reaching restrictions on the right of rescission of executed or part-executed contracts. The chief remedies available at common law for the enforcement of the right of *restitutio in integrum* were (1) an action for money had and received, whereby all money paid by one party to the other under the rescinded contract could be recovered; (2) an action of trover for the recovery of the value of all chattels the ownership or possession of which had passed under the contract; and (3) an action of ejectment for the recovery of land the possession of which had passed under the contract, without the passing of a legal estate or interest by means of an executed conveyance or grant. These remedies are obviously imperfect and one-sided. They were not supplemented by any right of action on a *quantum meruit* for the value or cost of acts of part-performance. Nor were they supplemented by any remedy by way of pecuniary compensation in respect of loss suffered by either party in consequence of the depreciation or loss of the subject-matter of the contract or in any other manner. Therefore, if the common law had, for example, permitted the rescission by the purchaser of the sale of goods after they had been consumed or deteriorated by the use of them, the purchaser could, in an action for money had and received, have recovered the entire purchase-money as if the contract had not been made, but the vendor would have had no corresponding remedy for the loss or deterioration of his goods. So, if the law had permitted a contract for the sale of land to be rescinded by the purchaser before conveyance, but

(m) *Clarke v. Dickson* (1858), E. B. & E. 148, 154-5, *per* Crompton, J.; 120 E. R. 463, 466

(n) *Sheffield Nickel Co. v. Unwin* (1877), 2 Q. B. D. 214, 223.

after the purchaser had been for a substantial period in possession under the contract, the vendor would have had no remedy for the recovery of compensation for the use and occupation of his land during the interval (o).

Rescission in Equity. Equity, no less than the common law, recognised the general principle that the possibility of adequate *restitutio in integrum* of the other party was a necessary condition of the right of rescission. In equity, however, the judicial remedies available for securing such restitution were so much more flexible and comprehensive than those existing at common law that the application of this principle was much less restrictive, so that judicial rescission in equity was available in many cases in which it was not permissible by the act of the party at common law. The matter is thus explained by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (p): "It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*. It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in Courts of law and equity, owing, as I think, to the difference of the machinery which the Courts have at command. . . . It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost. . . . But a Court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot

(o) *Hunt v. Silk* (1804), 5 East 449; 102 E. R. 1142.

(p) (1878), 3 App. Cas. 1218, 1278-9.

restore the parties precisely to the state they were in before the contract" (q).

The result is that the rigid rule of the common law that a party seeking to rescind a contract by his own act is unable to do so unless the other party can in all respects be restored to his *status quo ante*, having regard to the common law remedies available to him for that purpose, has in equitable suits for rescission by judicial decree been expanded into the more reasonable rule that the Court will decree rescission on such terms as to restitution as are adequate to do practical justice between the parties, having regard to the appropriate remedies available in equity for such a purpose, but that if restitution in this sense is impossible rescission will be refused. This extension of the scope of permissible rescission is all the more necessary since the establishment by *Redgrave v. Hurd* (r) of the doctrine that even innocent misrepresentation is a ground of rescission. For in such a case the alternative remedy of an action for damages is not available, and the exclusion of the remedy of rescission by the requirement of *restitutio in integrum* would amount to the refusal of any remedy at all.

Modern Doctrine of Rescission. The modern doctrine on this subject is illustrated by the case of *Hulton v. Hulton* (s). This was a wife's suit against her husband for the judicial rescission of a deed of separation on the ground of fraud. The deed had been in force for five years, and under it the husband had paid his wife an annuity of £500 a year. He claimed that, as a condition of rescission, his wife should be required to repay him these sums. Rescission, however, was decreed without any such condition of restitution. The question is thus dealt with by Scrutton, L.J. (t): "It is said that the Court will only rescind the contract if it can put the other party back in the position in which he was before the contract. Courts of equity, which have long exercised this power of rescission, have endeavoured to do so on the principle that he who seeks equity must do equity, and that he who asks to have a contract rescinded must as far as possible put the parties back into the position in which they were before the contract was made. . . . A Court of equity has always in such a case, as I understand, endeavoured to do justice between the parties by making each of

(g) See further *Spence v. Crawford*, [1939] 2 A. E. R. 271, 279-80, 288.

(r) (1881), 20 Ch. D. 1. See p. 239, *ante*.

(s) [1917] 1 K. B. 813.

(t) At pp. 825-6.

them return whatever benefit he has received under the deed, and if the benefits on the one side and the other are commensurate there is no question of return, because whatever has been received by the one party has been paid for by the other. As an illustration of that I may take the case of the purchase of a house being set aside and a reconveyance ordered on repayment of the purchase-money, when the party who has occupied the house has to pay an occupation rent. . . . Applying that to the present case, while it is true that the wife has received £500 a year for some years, the husband has received during those years freedom from molestation, freedom from proceedings by the wife for restitution of conjugal rights, and other very considerable advantages. Taking all that into account, I see no reason for ordering the return of the £500 a year, a sufficient *quid pro quo* having been given to the husband" (u).

Both Parties May Claim Status Quo Ante. So much for the obligation of him who rescinds a contract, on the ground of misrepresentation, to make restitution to the other party. Now, as to the right of the rescinding party himself to obtain restitution from the other. If he rescinds the contract, he has the same right to the restoration of the *status quo ante* as the other party himself. Each party must equally restore to the other all property that has been obtained, for the contract is avoided *ab initio* and cannot therefore support a claim by either party to retain what has been acquired under it. The continued possibility of *obtaining* such restitution is not, indeed, a condition of the right of rescission, as the continued possibility of *making* such restitution to the other party is (x). For the rescinding party can please himself as to this, and if he chooses to rescind in a case where it is impossible for him to obtain restitution it is not for the other party to object. But if he does rescind the contract, he is entitled to obtain such restitution as is possible.

(u) It appears to be a question whether the principle of *restitutio in integrum* by the rescinding party is not modified in the case of insurance contracts to the extent that if the policy is rescinded for the assured's fraud (whether by way of concealment or otherwise) the insurer is not required to return the premiums. See Spencer Bower, *Actionable Non-Disclosure* (1915), 204; Macgillivray, *Insurance Law* (2nd ed.), 961-3; Halsbury, *Laws of England* (2nd ed.), vol. 18, 450, n. (b). Such a rule, if authentic, would seem to be an anomaly. It is common, indeed, for policies to provide that where rescission is obtained by the insurer even for innocent misrepresentation or concealment by the assured any premiums paid shall be forfeited. A provision to this effect appears to be valid and effective. *Thomson v. Weems* (1884), 9 App. Cas. 671, 682.

(x) See the statement of the rule by the Privy Council in *Urquhart v. Macpherson* (1878), 3 App. Cas. 831, 838; *Spence v. Crawford*, [1939] 3 A. E. R. 271, 279.

In respect of the nature and measure of this right of the rescinding party, it is necessary to distinguish between fraudulent and innocent misrepresentation for at least two reasons. First, the doctrine of *restitutio in integrum* is applied in some respects more extensively against a fraudulent party than against one guilty of merely innocent misrepresentation. Thus as against a defendant guilty of fraud, though not as against a defendant guilty of a merely innocent misrepresentation, the Court will compel the restoration of property the title to which has already passed to the defendant by or under the contract (y). In this respect, indeed, it appears that the Court will go even further and if the fraudulent defendant has since disposed of the property but still has assets representing it, these assets will be affected by the doctrine of *restitutio in integrum* and the Court will order that they be restored to the plaintiff on proper terms (z). Secondly, in the case of fraud *restitutio in integrum* is only one of the remedies available to the rescinding party, the other being an action for damages for the fraud, whereas in the case of innocent misrepresentation rescission and restitution is the only remedy which he possesses.

Fraud—Rescission and Damages. In a case of fraud, are the two remedies of rescission and damages alternative, or are they cumulative? Can the party defrauded both rescind the contract and also sue for damages for any loss suffered by him through his partial execution of it, or must he elect between these two remedies? On principle it seems clear that these remedies are cumulative and not alternative, and there seems no authority to the contrary. It is said by Bowen, L.J., in *Newbigging v. Adam* (a): "Common law recognised a rescission . . . but, besides this, the common law gave damages for deceit, and in my opinion gave them, not as an alternative remedy, but as an alternative or cumulative remedy as the case might be." Thus, if a contractor is induced to enter into a contract for the excavation of land by fraudulent misrepresentations as to the nature of the substrata to be excavated, what is his remedy if, after doing half of the work, he discovers that, owing to the true nature of the ground, the work can only be completed at a cost far exceeding the contract price? Let us suppose that he has incurred heavy expenses in purchasing the necessary plant and machinery required for the contract, but useless for other

(y) See pp. 260 *et seq.*, *ante*.

(z) *Spence v. Crawford*, [1939] 3 A. E. R. 271

(a) (1886), 34 Ch. D. 582, 592.

purposes. If by rescinding the contract he loses his right to sue for damages in an action of deceit, he will be unable to recover compensation for his lost expenditure in plant and machinery, for a claim of this kind would be outside the scope of the remedy of *restitutio*. If, on the other hand, by suing for damages he loses his right to rescind, he will be bound to go on with the completion of the contract, possibly at a ruinous expense. And if in such a case he sought to include this additional expense in his claim for damages, he would be properly met by the defence that it was his duty to minimise the damages by rescinding the contract, and that any loss incurred by him in completing it, after knowledge of his right to rescind it, was his own fault, and cannot be charged to the defendant. If such a defence was not allowed, the other party might be ruined by the wilful insistence of the contractor in proceeding with the execution of the contract with full knowledge of the extra cost involved in it and of his right to discontinue its performance. It seems clear, therefore, that justice can be done to both parties only by a rule which permits the defrauded party both to sue for damages and to rescind the contract. By this cumulative remedy full justice will be done, for each party will be required to return to the other all money or property received under the contract, and *quoad extra* the defrauded party will be entitled to damages for all loss suffered by him through being induced to enter into it (b).

Innocent Misrepresentation—Rescission but No Damages. Where, however, the misrepresentation is innocent, the other party is limited to the right of rescission and restitution. There can be no supplementary claim for damages. It is therefore important in all cases of the rescission of an executed contract on the ground of innocent misrepresentation to know the true nature and limits of this exclusive remedy of *restitutio in integrum*. The question is one of grave difficulty which cannot be definitely or confidently answered in any general form on the authorities as they stand. This much, however, is clear—that the right of *restitutio in integrum* does not extend to the complete restoration of the *status*

(b) It is sometimes said, indeed, that rescission and damages are alternative remedies: e.g., Halsbury, *Laws of England* (2nd ed.), vol. 23, 77. It is thought, however, that this statement must be restricted to cases of wholly executory contracts. If the only consequence of the fraud were the inducement of the contract, and the contract, being wholly executory, were rescinded, it would be impossible to establish any damage to support an action of deceit. But where the contract has been partially executed by the injured party the position will be quite otherwise. See *Hill v. Stephen Motor and Aero Co., Ltd.*, [1929] 3 D. L. R. 676.

quo ante so as to place the parties by means of pecuniary compensation in the same position in all respects as if the contract had never been made. Such a rule would abolish the established distinction between a claim for damages and a claim for *restitutio in integrum*, and would impose upon him who induced a contract by innocent misrepresentation the same liability as if he had induced it by fraud. And this applies to both parties to the contract. "One who deludes another in a contract, or permits him to be deluded, and takes advantage of that delusion, cannot afterwards complain that, if the contract be set aside, he will be in a worse situation than if the contract had never been entered into" (c). And this is so even in the case of innocent misrepresentation. He who by such means induces another person to buy shares from him cannot object to the rescission of the contract and the return of the shares because in the interval the shares have depreciated in market value or even become worthless (d).

Pecuniary Adjustments on Rescission. The essential effect of *restitutio in integrum* is not the restoration in all respects of the *status quo ante*, but the reciprocal restoration by each party to the other of all money or property which either of them has received from the other in pursuance of the contract. At common law this was the entirety of the matter. Equity, however, will, as incidental or accessory to such restoration, make pecuniary adjustments between the parties in respect of the profit or loss accruing to the parties from the possession of the property so restored. Money refunded must be refunded with interest. If land is to be restored by either party, he must account for the rents and profits during his occupation, or pay an occupation rent for it. If the possession of the property restored has involved the possessor in pecuniary liabilities, he is entitled to an indemnity against them. But all this may fall far short of that complete restoration of the parties to their former position, which is the object and consequence of an action for damages when such an action is available (e).

Nor can a party whose only right is *restitutio in integrum* claim on a *quantum meruit* the pecuniary value of his acts of part-performance. To allow such a claim under the guise of restitution would in many cases be to impose on the other party the same pecuniary liability as if he had procured the contract by fraud.

(c) *Blake v. Mowatt* (1856), 21 Beav. 603, 613-4; 52 E. R. 993, 997.

(d) *Adam v. Newbigging* (1888), 13 App. Cas. 308.

(e) See *Adam v. Newbigging* (1888), 13 App. Cas. 308; (1886), 34 Ch. D. 582.

Thus, in the Scottish case already cited of *Boyd & Forrest v. Glasgow Railway Co.* (f), the contractors, after building the railway for the contract price, rescinded the contract for innocent misrepresentation, and claimed as on a *quantum meruit* the true cost of construction (which was far in excess of the contract price), giving credit to the railway company for the price already received. This claim was allowed by the Scottish Courts, but rejected by the House of Lords as beyond the scope of *restitutio in integrum*. It is obvious that if such an extension of the right of restitution had been allowed the liability of the railway company for its innocent misrepresentation would have been no less than the liability for damages which it would have incurred by fraud.

What, then, is the real remedy by way of rescission in such a case? The railway company had nothing to restore. It had received no property from the contractors which it was possible to return. The contractors, on the contrary, had received the contract price, and this was capable of restitution. But if the railway company had insisted on such restitution as a condition of the rescission of the contract, the principle adopted by the Court of Appeal in *Hulton v. Hulton* (g) of setting off the benefit on one side against the benefit on the other would have applied. So far as the railway company had received the benefit of part execution of the contract, the contractors, notwithstanding rescission, would have been entitled to retain the contract price. So far, on the other hand, as any moneys received by the contractors exceeded the value to the railway company of the part execution of the contract, the contractors would have been obliged to refund those moneys as a condition of rescission. But the contractors could not in any case recover the cost to themselves of the work done by them over and above the proper proportion of the contract price. A claim of such kind pertains not to *restitutio in integrum*, but to damages for fraud.

§ 102. Rescission Prevented by Intervening Jus Tertii

Although rescission destroys not only the contractual right created by the contract, but also proprietary rights which may have been acquired by a party in pursuance of the contract (such as the ownership of goods obtained under a contract of sale procured by fraud), nevertheless such proprietary rights cannot be thus

(f) [1915] S. C. (H. L.) 20; see p. 258, *ante*.

(g) [1917] 1 K. B. 813; see p. 267, *ante*.

destroyed by the rescission of the contract after they have passed into the hands of third persons who are purchasers for value in good faith without notice of the voidable nature of the contract. In other words, the rescission of a contract does not so operate as to destroy an intervening *jus tertii* in the subject-matter of the contract (*h*). Property reclaimed on the rescission of the contract under which it passed must be reclaimed while still the property of the other party to the contract, or of an assignee not being a purchaser for value in good faith. If X is induced by fraud to sell his horse to Y, and Y sells it to Z who has no knowledge of the fraud, it is too late for X to rescind the contract and demand the return of the horse. His only remaining remedy is an action for damages against Y who defrauded him. In this respect the common law right to rescind a contract and reclaim the property that has passed under it is in the same position as an equitable right to property which is vested at law in another person : it is subject, that is to say, to the risk of destruction by the transfer of the legal ownership to a purchaser for value without notice.

In applying this rule as to the *jus tertii*, however, there are two distinctions to be borne in mind. In the first place, it applies only to the revesting of property which has actually been divested : it has no application to the reclaiming of property which has not been divested at all. Accordingly if the contract is part of a mixed act in the law intended to be both a contract and a conveyance (as in the case of the ordinary sale of specific goods on credit) and that act in the law is not merely voidable but void, as by reason of *error in consensu*, no title at all to the property vests in the party to whom the act in the law purports to convey it, and he can therefore give no title even to a purchaser for value in good faith (*i*).

In the second place, the rule as to *jus tertii* applies only to the protection of assignees of the property acquired under the rescinded contract, not to the protection of assignees of the contract itself or of any merely contractual rights created thereby. The assignee of a contract or of a contractual right stands in no better position than the assignor himself. If the contract is subject to rescission by the other party it can be rescinded after such assignment no less than before, and it is immaterial that the assignee was a purchaser for value without notice. X sells and delivers his horse to Y for

(*h*) *Babcock v. Lawson* (1880), 5 Q. B. D. 284.

(*i*) Cf. *Cundy v. Lindsay* (1878), 3 App. Cas. 459, and *Phillips v. Brooks*, [1919] 2 K. B. 243; and pp. 14, n. (f) and 226, *ante*.

the sum of £20 to be paid in a month. Y resells the horse to a sub-purchaser, and X assigns the debt of £20 to one of his creditors. What is the position if the contract of sale is then rescinded on the ground of fraud? If it is rescinded by the seller X for the fraud of the purchaser Y, the sub-purchaser of the horse nevertheless retains a good title to it. But if it is rescinded for the fraud of the seller X, the creditor of X who took an assignment of the debt of £20 will lose his title. For he who bought the horse bought the legal ownership of a chattel and is protected against rescission by the rule of *jus tertii*, but he who took an assignment of the debt bought a mere contractual right and has no such protection (*k*).

§ 103. Election to Rescind or to Confirm

The right of rescission is finally lost if the party entitled to rescind elects, instead of doing so, to *confirm* the contract. On the discovery of the facts which entitled him to rescind he is not bound to exercise that right, for it may nevertheless be in his interest to keep the contract in force and to sue for damages for deceit, or even to keep it in force although he has no right of action for damages. Therefore he has a right to elect between the rescission and the confirmation of the contract; and, in accordance with the general rule as to election, an election once made in either way is final and cannot be reversed. A binding election is constituted by any words or acts which unequivocally express or indicate his intention to rescind or to confirm the contract. If, for example, with full knowledge of his right to rescind, he proceeds with the performance of the contract, or demands performance from the other party, or exercises rights conferred on him by the contract, in such manner and in such circumstances as to indicate an intention to stand upon the contract, he cannot afterwards rescind it. But he cannot in this manner lose his right of rescission by acts done before he knows the facts which entitle him to rescind. Mere delay in making his election after knowledge of his rights does not in itself amount to the confirmation of the contract. There is no rule of law that he must rescind immediately or within a reasonable time. He is entitled to suspend his judgment and election, and to consult his own interest in the matter by reference to the event. But if he does so delay he runs certain risks and may in the result lose his right of rescission. Thus he may be barred by an intervening

(*k*) *Graham v. Johnson* (1869), L. R. 8 Eq. 36; see p. 472, *post*.

jus tertii in accordance with the rule already explained. So also his delay may be so great, or may take place in such circumstances, as to be in itself sufficient evidence and indication of his election to confirm the contract. And, further, his delay may so embarrass and prejudice the other party by reason of the continued uncertainty of the issue as to make it unjust that the contract should now be rescinded. He who so refuses either to rescind or confirm may be properly held estopped from denying that he had confirmed the contract. He who insures his property under a contract voidable for misrepresentation is entitled to know at once while the risk is current whether the insurer intends to confirm or rescind, for in the latter case it will be necessary and in the former unnecessary to effect a new insurance. So he who purchases a building-site is entitled to know at once the manner in which the vendor intends to exercise his election, and if the vendor, knowing of his right to rescind, waits until the purchaser has erected a house on the land, rescission will not be permitted.

The law is thus stated by Mellor, J., delivering the judgment of the exchequer Chamber in *Clough v. London and North Western Railway Co.* (1): "The contract continues valid till the party defrauded has determined his election by avoiding it. . . . If it can be shown that the . . . company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But . . . we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. . . . In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract, or has he elected to avoid it, or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

(1) (1871), L. R. 7 Ex. 26, 34-5.

§ 104. Application of Foregoing Principles to Shares and Debentures

In relation to shares and debentures the foregoing rules of common law and equity have been supplemented by statute. By section 35 of the Companies Act, 1929, every prospectus issued by or on behalf of a company or by or on behalf of any person who is or has been engaged or interested in the formation of the company must state certain specified particulars. In the case of non-compliance with these requirements the remedy of the shareholder or debenture-holder appears to be an action for damages against the directors or promoters responsible for the prospectus, and not rescission (*m*). By section 37 of the same act persons induced to subscribe for shares or debentures by an untrue statement in a prospectus may recover compensation from directors and promoters for any loss sustained by reason of that untrue statement. A director or promoter may escape liability under this section by showing that he had reasonable ground to believe the statement and continued to believe it until allotment of the shares or debentures, or that the statement purported to be and was a correct and fair copy of or extract from or fairly represented an official statement or document or the report or valuation of an expert. Such a defence, so far as it rests on the report or valuation of an expert, may be met by proof on the part of the shareholder or debenture-holder that the director or promoter had no reasonable ground for believing that the alleged expert was competent to make the report or valuation (*n*).

(*m*) *Re Wimbledon Olympia, Ltd.*, [1910] 1 Ch. 630; *Re South of England Natural Gas Co.*, [1911] 1 Ch. 573; see, however, *Nash v. Lynde*, [1929] A. C. 158

(*n*) For a full consideration of these sections (35 and 37) of the Companies Act, 1929, see Buckley, *The Companies Acts* (11th ed.), pp. 66—87.

CHAPTER XII

NON-DISCLOSURE AND UNDUE INFLUENCE

§ 105. Essential Principles

Concealment in General has No Effect. From the point of view of morality as contrasted with law and of honourable dealing as contrasted with legal obligation the duty of veracity is twofold, inasmuch as it includes not only the negative duty not to pervert the truth by actual misrepresentation, but also in many cases the positive duty of disclosing the truth so as to forgo the advantage that would otherwise be derived from the ignorance of others. We have already in the previous chapter considered the extent and manner in which the law of contracts recognises and enforces the first of these duties. The law refuses to allow any contracting party to hold the benefit of a contract into which he has led the other party by positive misrepresentation of the facts, and by modern law at least it makes no difference in this respect whether the case is one of wilful fraud or one of innocent mistake. No man is suffered to take advantage of error induced by his own actions, and all contracts are therefore conditional on the truth of the statements by means of which they have been procured and induced.

In the present chapter we have to consider how far, if at all, the law recognises, in addition to the duty of positive veracity, the duty of disclosing the truth to the other contracting party and of refusing to take advantage of his ignorance or error as to the material facts which form the basis and inducement of the contract. We have to consider how far, if at all, the mere non-disclosure of the truth has the same invalidating operation as the perversion of it.

In general, the law of contracts recognises no such obligation and no such ground of invalidity. Whatever may be the higher standard of moral duty and honour the law is commonly content if there has been no positive misrepresentation. Silence does not commonly amount to fraud or to any ground of invalidity, even though the ignorance or misconception of the other party is well known and advantage is knowingly and intentionally taken of it. The law willingly allows to every contracting party the benefit of his superior knowledge, just as it allows him the benefit of his superior

skill, judgment, and discretion; and it is content to leave the other party to suffer the disadvantages and to bear the cost of his ignorance, his folly, and his want of circumspection. He who sells his shares in a company is not bound to disclose to the buyer his knowledge of the company's disastrous financial position, even though he well knows that the buyer is under a misapprehension upon this point and would not buy the shares if he knew the truth. He who sells a house is not bound to disclose the fact that its foundations are ruinous, nor is he who buys a piece of land bound to reveal his knowledge that, owing to the existence of valuable minerals contained in it, it is worth ten times what he pays the ignorant seller for it. The general rule of law is *caveat emptor* and *caveat venditor*, and the same principle extends to contracts in general and is not limited to transactions of sale and purchase. A contracting party is entitled to complain that he has been misled as to the truth, but not that he has been left in ignorance (a).

Exceptions—Contracts Uberrimæ Fidei. To this general rule of lawful silence the law recognises important exceptions. In certain classes of contracts there is a legal duty not merely to refrain from erroneous statements, but actually to disclose the truth, and in those cases a failure to make such a disclosure has the same invalidating operation as positive fraud. Contracts in respect of which there exists this duty of disclosure are often referred to as contracts *uberrimæ fidei*. Such an expression, however, seems unsuitable for inclusion in a system of scientific terminology, suggesting, as it does, that good faith is a mere matter of degree. It would seem better to use the expression *contracts of good faith*, meaning thereby not that merely negative good faith which stands in the avoidance of actual misrepresentation, but that positive good faith which stands in the refusal to take improper advantage by silence of the ignorance of the other contracting party.

A failure to perform this duty of disclosing the truth may be termed non-disclosure. Concealment is sometimes used in this context (b), but it seems less suitable, suggesting, as it does, that *active* concealment which consists in taking measures for the

(a) *Fox v Mackreth* (1791), 2 Bro. C. C. 400; 29 E. R. 224; 2 Cox 320; 30 E. R. 148; *Peek v. Gurney* (1873), L. R. 6 H. L. 377, 390 ff.; *Turner v. Green*, [1895] 2 Ch. 205; *Bell v. Lever Bros., Ltd.*, [1932] A. C. 161, 227-8, 231-2.

(b) Thus in *London Assurance v. Mansel* (1879), 11 Ch. D. 363, 370, Jessel, M.R., said: "Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact".

prevention of the discovery of the truth, and which, as already indicated (c), amounts to fraud. *Aliud est celare, aliud tacere.*

Exceptions—Undue Influence. The law as to this special duty of disclosure in contracts of good faith will form one of the matters to be dealt with in this chapter. It is necessary, however, to deal at the same time with a different, though closely related, subject. Side by side with the law as to that non-disclosure of the truth whereby a contracting party takes improper advantage of the ignorance of the other party there stands the related law as to that undue influence whereby one party takes improper advantage of the weakness or subordination of the other. By undue influence is meant *the improper use by one contracting party of any form of oppression, coercion, compulsion, or abuse of power or authority, for the purpose of obtaining the consent of the other party.* Such undue influence has the same invalidating operation on the contracts induced thereby as fraud or misrepresentation on contracts in general, or non-disclosure on contracts of good faith. In general, indeed, the law does not concern itself to protect the party to a contract against his own weakness and the superior power or authority of the other party, any more than it protects him against his own ignorance or folly and the superior knowledge or astuteness of the other party. The law does not require that the consent of a contracting party shall be free in the sense that he is exempt from all manner of constraint or necessity in the making of it, so that the contract represents in all respects his free and willing choice. Within due limits the law leaves every man at liberty to use his power or influence over others for the purpose of obtaining contracts from them which they would not otherwise have willingly entered into, just as he is at liberty to use his superior knowledge or acumen for the same purpose. Contracts of service between masters and men are not invalidated by the fact that the wages have been fixed by the coercive action of the masters in threatening a lock-out or by that of the men in threatening a strike. Nevertheless this liberty of coercion and of taking advantage of the weakness, necessities, and subordination of others is subject to legal limitations corresponding to those imposed by the law upon the liberty of the non-disclosure of the truth for the purpose of taking advantage of the ignorance of others. Coercion which overpasses these limits is called undue influence and invalidates the contract.

(c) See p. 250, *ante*.

A contract of ransom made with brigands is no less invalid than if it had been procured by fraud.

Exceptions—Applicability of. Both with respect to non-disclosure and with respect to undue influence contracts are of two kinds, which must be separately considered. The first kind consists of those made by persons between whom there already exists, antecedently to the contract, a fiduciary relation imposing special duties upon one party towards the other in respect of the making of contracts between them. The second kind consists of contracts made by persons between whom there is no such antecedent fiduciary relation. The parties are, so to speak, strangers to each other, dealing with each other at arm's length, and neither of them owes to the other any special duty based on any special relation between them.

The term fiduciary relation is here used in a wide sense to include not merely the relation of trustee and beneficiary, but any relation whatever which is recognised by the law as involving either confidence or authority of such a description as to create a duty not to betray that confidence or to abuse that authority. Where such a relation of confidence or authority exists, and is abused for his own ends by the person in whom the confidence is imposed or the authority is vested, the contract which he so obtains from the other party is invalid, either because of non-disclosure amounting to betrayal of confidence, or because of undue influence amounting to abuse of authority, or for both reasons at once, even if in fact it is free from actual fraud. Examples of such fiduciary relation are the relations between a trustee and his beneficiary, a parent and a child, a guardian and a ward, an agent and his principal, a solicitor and his client, a medical adviser and his patient, a priest or other spiritual superior and those under his spiritual control and influence.

In respect both of non-disclosure and of undue influence, the existence of an antecedent fiduciary relation brings into operation special rules and considerations which are not in point in the case of contracts made between strangers, and it makes little difference in this respect whether the abuse of the fiduciary relation takes the form of undue non-disclosure or of undue influence. The whole matter therefore requires to be dealt with under three distinct heads: (1) Non-disclosure in the absence of any fiduciary relation; (2) undue influence in the absence of any fiduciary relation;

(3) non-disclosure and undue influence by way of the abuse of a fiduciary relation.

§ 106. Non-Disclosure in Contracts of Good Faith in Absence of Fiduciary Relation

Contracts of Insurance. Apart from cases of fiduciary relation, a typical and, indeed, probably the only true example of a contract of good faith requiring full disclosure of all material facts as a condition of its validity is the contract of insurance. This rule originated in respect of marine insurance, but has been extended to insurance in all its forms. As to marine insurance, the rule has been given statutory form and authority by the Marine Insurance Act, 1906 (*d*), though as to other forms of insurance it remains a rule of the common law. The common law, unaided by equity, established in respect of insurance contracts two special principles which did not exist in the case of other contracts. The first of these was that a contract of marine insurance was invalidated by the material misrepresentation of any material fact on the part of the assured even in the absence of fraud (*e*). That is to say, the common law anticipated in contracts of this special class the later equitable rule of *Redgrave v. Hurd* (*f*) in respect of the invalidating operation of innocent misrepresentation upon contracts in general. The second principle was that with which we are here immediately concerned—namely, that a contract of insurance, whether marine or not, is invalidated by the non-disclosure of any material fact on the part of the assured which was or ought to have been known to him and was unknown to the insurer, however innocent or accidental such non-disclosure may have been (*g*). For the purpose of both of these principles a material fact is one which has such a relation to the risk to be insured against as to be calculated to affect the mind of a prudent and reasonable insurer in determining whether he will accept the risk or in determining the terms on which he will do so (*h*) (*i*).

(*d*) S. 18.

(*e*) See pp. 233, 234, *ante*.

(*f*) (1881), 20 Ch. D. 1. See p. 239, *ante*.

(*g*) *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Proudfoot v. Montefiore* (1867), L.R. 2 Q. B. 511.

(*h*) Marine Insurance Act, 1906, s. 18 (2); *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co., Ltd.*, [1925] A. C. 344 (life insurance)

(*i*) In most cases the rule as to misrepresentation will produce the same effect as the rule as to non-disclosure, for the misrepresentation of a fact is necessarily also the non-disclosure of the truth as to it. But the rule as to non-disclosure does not apply to those facts which, although material, the assured neither knows nor ought to know, whereas the marine insurance rule as to misrepresentation is not so limited. Halsbury, *Laws of England* (2nd ed.), vol. 18, pp. 276, 410–11.

The exceptional rules so recognised by the common law as to the validity of contracts of insurance were reconciled with the general rule of the common law that contracts were not invalidated by mere innocent misrepresentation or concealment by recourse to the doctrine of implied conditions. It was held to be an implied conventional condition of every contract of marine insurance that there had been no material misstatement, and of every contract of insurance that there had been no material non-disclosure, of those facts to which the respective rules related. The justification of this implication of conditions unknown to other contracts was found in the necessary ignorance of the insurer as to the true nature of the risk proposed to him, and his necessary reliance on the accuracy and fullness of the representations received by him from the assured himself (*k*). As now embodied in the Marine Insurance Act, 1906, these rules, so far as they relate to marine insurance in particular, are no longer placed on the basis of implied conditions read into the contract, but have acquired an independent status as external conditions imposed by the law itself on the validity of the contract (*l*).

It is to be noticed that this effect of misstatement or non-disclosure upon the validity of a contract of insurance is not identical with the effect of fraud at common law or innocent misrepresentation under the rule in *Redgrave v. Hurd* (*m*). This ground of invalidity in contracts of insurance depends exclusively on the materiality of the misstatement or non-disclosure, and not, as in the ordinary law of fraud or innocent misrepresentation, on its operation as the inducing cause of the contract. A contract of insurance is invalidated because the misstatement or non-disclosure is in its nature calculated to influence the mind of the insurer. It is not necessary that it should have actually done so.

Over and above the conditions so imposed or implied by law as to the absence of material misstatement or non-disclosure, contracts of insurance frequently contain express conditions—express warranties, as that term is used in insurance law—of the truth of specific statements made by the assured in answer to specific questions put by the insurer. By the express terms of the contract the truth of such answers is made, as it is said, the basis of the contract—that is to say, an essential condition of its validity. In

(*k*) *Carter v. Boehm* (1766), 3 Burr. 1905, 1909, 1911; 97 E. R. 1162, 1164, 1165.

(*l*) Cf. *Merchants' Insurance Co. v. Hunt*, [1941] 1 K. B. 295, *per* Scott, L.J. 312-3, and *per* Luxmoore, L.J., 318.

(*m*) (1881), 20 Ch. D. 1. See p. 239, *ante*.

such a case it is entirely irrelevant whether those statements are material or not, and whether they induce the contract or not; if they are in any respect erroneous, whether material or immaterial, and whether operative or inoperative as a means of inducement, the contract is invalidated by the failure of an express condition thereof (*n*).

Contracts of Suretyship, Partnership, and for the Sale of Land. It is sometimes said that the duty of disclosure of material facts imposed by law in contracts of insurance is not limited to this particular case, but extends to certain other kinds of contracts also. Thus it is said that it applies to some extent at least to such contracts as suretyship (*o*), partnership (*p*), and the sale of land (*q*). This is a question which so far pertains to the detailed law of the particular contracts in question that it need not here be definitely dealt with. On principle there is no reason why the same considerations which have induced the law to impose this condition on the validity of contracts of insurance may not be sufficient to establish a similar rule in certain other kinds of contracts, in which one of the contracting parties is necessarily at the mercy of the other in respect of the material facts of the case (*r*). It is clear, however, that certain instances commonly adverted to as illustrating such an extension of the duty of disclosure are properly to be explained on different principles. Thus it is said that, in a contract for the sale of land, the vendor is under an obligation to disclose all defects of his title—such as the existence of restrictive covenants affecting the use of the land—and that if he fails to do so the contract is voidable by the purchaser. But the true explanation of this matter is that the existence of such defects renders it impossible for the vendor to perform his contract, and it is for this reason that the purchaser is entitled to rescind (*s*). A contract for the sale of land is a contract to transfer to the purchaser the unencumbered fee simple of the land, unless the vendor's obligation is

(*n*) *Anderson v Fitzgerald* (1853), 4 H. L. C. 484; 10 E. R. 551; *Dawsons, Ltd. v Bonnin*, [1922] 2 A. C. 413, 423, 429, see p. 234, n. (*h*), *ante*.

(*o*) See *per Romer, L.J.*, in *Seaton v. Heath*, [1899] 1 Q. B. 782, 792 (reversed on facts: [1900] A. C. 135); and *per Lord Atkin in Trade Indemnity Co. v. Workington Harbour and Dock Board*, [1937] A. C. 1. 17.

(*p*) *Bell v. Lever Brothers, Ltd.*, [1932] A. C. 161, *per Lord Atkin*, 227.

(*q*) Cf. *Pollock, Contract* (11th ed.), 436–56, *Anson, Law of Contract* (18th ed.), 184–8.

(*r*) In *Bell v. Lever Brothers, Ltd.* (*supra*) the House of Lords refused to hold that an ordinary contract of service was a contract *uberrimæ fidei*.

(*s*) See *Ellis v. Rogers* (1885), 29 Ch. D. 661, 670, and *Williams, Vendor and Purchaser* (3rd ed.), vol. 1, p. 32, n.

expressly limited to some different and more restricted title (t). If, therefore, the vendor's title to the land or any part of it is less than an unencumbered fee simple, and he does not disclose this fact and limit his obligation to the title actually possessed by him he cannot fulfil his contract, and the purchaser is entitled accordingly to rescind it as for a breach thereof. The contract is invalidated, not because of the breach of any supposed duty of disclosure in contracts of this nature, but merely because the vendor has contracted to do what he is unable to do, and to transfer a title which he does not possess. In the absence of any provision in the contract to the contrary, the existence of defects in the subject-matter of the sale, not being defects in the title to it, has no effect upon the validity of the contract, and there is no duty to disclose such defects, for they do not, like defects of title, prevent the vendor from performing his contract. If a house is sold which is in a ruinous or insanitary condition to the knowledge of the vendor, but unknown to the purchaser, the vendor, unless the contract provides otherwise, is under no duty to disclose the fact, and the contract is valid, for *caveat emptor* (u). But if the land is subject to a restrictive covenant (x) preventing it from being used for certain purposes, the vendor must disclose this fact, for if he does not he will undertake an obligation which he is unable to fulfil—namely, the conveyance of an unencumbered fee simple (y).

§ 107. Undue Influence in Absence of Fiduciary Relation

We pass now from the invalidating operation of non-disclosure of the truth to the like operation of undue influence. Here also we leave out of account in the meantime those cases which are complicated by the existence of some antecedent fiduciary relation between the parties, and we consider exclusively the case of undue influence exercised as between strangers.

Duress. The term “undue influence” has its historical source in equity. At common law the corresponding term was duress. The common law, however, took a very restricted view as to the kinds of coercion or restraint which were sufficient to amount to

(t) *Hughes v. Parker* (1841), 8 M. & W. 244; 151 E. R. 1028; *Phillips v. Caldclough* (1868), L. R. 4 Q. B. 159.

(u) *Hoskins v. Woodham*, [1938] 1 A. E. R. 692.

(x) As to registration of such a covenant, see Land Charges Act, 1925, ss. 10 (1), 13 (2).

(y) *Flight v. Booth* (1834), 1 Bing. N. C. 370; 131 E. R. 1160; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487.

invalidating duress. Speaking generally, such duress must at common law amount to the use or threat of unlawful force against the person of the other contracting party, or (apparently) his wife, parent or child (z). Nothing less than this was enough to invalidate a contract. A contract procured by means of unlawful imprisonment or a threat of bodily harm was voidable for duress, but one procured by the wrongful seizure and detention of property was held by the common law to be unaffected by the illegality of the means so used for the obtaining of it (a). Equity, however, exercised a concurrent jurisdiction in such cases, and the equitable doctrine of the invalidation of contracts or other transactions by undue influence passed far beyond the narrow limits of the common law doctrine of duress (b). Undue influence, as understood in Courts of equity, included not only the duress of the common law Courts, but any form of coercion, compulsion, menace or persuasion used for the purpose of inducing a contract or other transaction and being of such a kind as improperly to infringe upon the liberty of choice and action (c). It may be assumed with some confidence that the common law in this matter is now obsolete as being superseded by the more extensive and more rational principles of equity. Just as the common law doctrine of invalidating fraud has now, to a very great extent, been merged in the wider equitable doctrine of invalidating misrepresentation, whether fraudulent or innocent, so the common law of invalidating duress is now merged in the wider equitable principle of undue influence. Doubtless the equitable doctrine on this matter had, and continues to have, its chief application in those cases of fiduciary relation which still remain for consideration, but the cases in which it applies in the absence of any such relation are not unimportant.

Duress Merged in Equitable Doctrine of Undue Influence. The extent to which modern law has thus passed beyond the former limits of the common law as to duress is indicated by the case of *Kaufman v. Gerson* (d), in which a contract by a married woman

(z) Pollock, Contract (11th ed.), 489

(a) *Skeate v. Beale* (1840), 11 Ad. & El. 983; 113 E. R. 688; *Ailee v. Backhouse* (1838), 3 M. & W. 633; 150 E. R. 1298; Bullen & Leake, Pleadings (3rd ed.), 565-6.

(b) *Mutual Finance, Ltd. v. John Wetton & Sons, Ltd.*, [1937] 2 K. B. 389, 394, 395; see also Holdsworth, History of English Law, viii, 51.

(c) See *Williams v. Bayley* (1866), L. R. 1 H. L. 200, per Lord Chelmsford at p. 216, and Lord Westbury at pp. 216 and 219; *Earl of Aylesford v. Morris* (1873), L. R. 8 Ch. 484, per Lord Selborne, L.C., 490; *Allcard v. Skinner* (1887), 36 Ch. D. 145, per Lindley, L.J., 183.

(d) [1904] 1 K. B. 591.

with her husband's creditor to pay a debt owing by her husband was held invalid because procured by a threat to prosecute her husband for the criminal fraud by which he had incurred that debt. This would not have been invalidating duress at common law, but it amounts at the present day to invalidating undue influence.

Assuming, then, that the common law of duress has been thus superseded by the equitable doctrine of undue influence, the question remains : What forms of coercion, oppression, or compulsion amount to undue influence invalidating a contract as between strangers between whom there exists no fiduciary relation? How is the line to be now drawn between those forms of coercion or persuasion which are permissible and those which the law recognises as unlawful and as a ground of contractual invalidity? To this question it is impossible, as the authorities at present stand, to give any definite or confident reply. In the case already cited of *Kaufman v. Gerson* (e) it is suggested that the line should be drawn by reference to general considerations of public policy, the question in each case being : "Is the coercion or persuasion by which this contract was procured of such a nature that the enforcement of a contract so obtained would be contrary to public policy?" Just as a contract may be invalid because it is contrary to public policy in its substance or its purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement. If this is the true underlying principle, it is for the law in its future development to reduce this general principle so far as possible to the form of specific rules in respect of divers methods of coercion, just as the requirements of public policy have been similarly made specific in respect of illegal and nugatory contracts. Where the instrument of coercion is the doing or threatening of a wilfully illegal act of any description, it may be anticipated that, notwithstanding the limits of the older common law of duress, a contract so procured will in general be held invalid. But even although the instrument of coercion is not thus in itself illegal, as in the case of a threat of prosecution, the enforcement of a contract so procured may nevertheless be held in appropriate cases to be contrary to public policy.

The formulation offered in the last preceding paragraph of the problem of what kind of conduct will constitute undue influence invalidating a contract between strangers was approved by Porter, J., in *Mutual Finance, Ltd. v. John Wetton & Sons, Ltd.* (f).

(e) [1904] 1 K. B. 591.

(f) [1937] 2 K. B. 389.

In that case a father and a son were the members and directors of a family company. A second son was alleged to have forged a guarantee in the name of the company as guarantor. The son who was a director of the company, fearing that the shock resulting from the prosecution of his brother for forgery might endanger the life of the father, at that time in ill-health, signed a new guarantee on behalf of the company. The recipient of the new guarantee knew and intended the director son to be influenced by this consideration. The father having subsequently died, the company, upon being sued on the new guarantee, successfully claimed to repudiate it for undue influence. After referring to cases in which similar threats with regard to a husband, a son, a nephew, and a brother-in-law respectively had been held to amount to undue influence, Porter, J., said (g), "Is the principle wide enough to cover the case where the persons involved are the brother and father of the alleged criminal? I think it is. It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution or possibility of prosecution of the person implicated, and were known and intended to have been so influenced by the person in whose favour the undertaking was given. . . . If the known object was to prevent the prosecution of his brother for whatever reason, that, I think, is enough".

Equitable Relief Against Fraud. In one instance, *viz.*, where there is some inequality in the position of the parties which enables one to exert an undue degree of pressure or influence on the other, a fairly precise principle has emerged. "There is hardly any older head of equity", said Lord Selborne, L.C., in *Earl of Aylesford v. Morris* (h), "than that described by Lord Hardwicke in *Earl of Chesterfield v. Janssen* (i) as relieving against the fraud 'which infects catching bargains with heirs, reversioners, or expectants, in the life of the father', etc. (k). 'These (he said)

(g) At p. 396

(h) (1873), L. R. 8 Ch. 484, 489.

(i) (1751), 2 Ves. Sen. 125, 157.

(k) At one time there was, in addition to the general principles of undue influence, an unqualified rule of equity protecting reversioners and expectant heirs who had dealt with their reversions or expectancies. "Other forms of similar extortion, although they kept clear of usury, were defeated by a fixed rule of this Court, which grew up out of the general equity. Post-obit securities and sales of reversions, or of annuities, or gross sums charged upon reversions, with or without

have been generally mixed cases', and he proceeded to note two characters always found in them. 'There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain'." "Fraud does not here mean deceit or circumvention", said Lord Selborne later in the same case (l), "it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."

This principle was applied by Kay, J., in a considered judgment in *Fry v. Lane* (m). In that case two brothers, "both poor persons in a humble position", one employed as a plumber's assistant, and the other as a laundryman earning £1 a week, were each entitled to a one-fifth interest in reversion in the residue of their uncle's estate, expectant on the death of the uncle's widow and subject to the contingency of their surviving her. The widow died in 1886 and a one-fifth interest in the residuary estate, which had by that time been converted into consols, was then worth about £730. In 1878 one brother had sold his interest for £170, the evidence being that such a reversionary interest in £730 would then be worth £475. In 1882 the other brother had sold his interest for £270. Neither brother had independent advice, and neither was informed that a legacy of £250, to which the residue had been subject, had, before the earlier of the two sales, been satisfied by arrangement and released. The purchasers, relatively to the vendors, were men of means and experience, and the solicitor who purported to act for both vendor and purchaser in each case "gave a great advantage to the purchasers, who had been former clients"

some element of risk, were held redeemable in every case in which the purchaser could not prove that he gave full value for his bargain": *per* Lord Selborne, L.C., L. R. 8 Ch. at 490. Now, however, the Law of Property Act, 1925, s. 174, in substance re-enacting the provisions of the Sales of Reversions Act, 1867, declares: "(1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of undervalue. In this sub-section 'reversionary interest' includes an expectancy or possibility. (2) This section does not affect the jurisdiction of the Court to set aside or modify unconscionable bargains." As to this section see Ashburner, *Equity* (2nd ed.), 298.

(l) P. 490.

(m) (1887), 40 Ch. D. 312.

and he considered "the purchaser's interest too much properly to guard that of the vendors". Kay, J., set the sales aside. "The result of the decisions", he said (n), "is that, where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of equity will set aside the transaction. This will be done even in the case of property in possession and *a fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable' " (o).

With *Fry v. Lane* may be usefully contrasted *Harrison v. Guest* (p). Here one Hunt, an illiterate bed-ridden man seventy-one years of age, had conveyed to the defendant property worth £400, in consideration that the defendant would allow him to occupy a room in a specified house, provide him with attendance, and supply him with food from the defendant's table. This consideration was worth very much less than the property parted with by Hunt. The initial offer in the matter had come from Hunt and the negotiation continued over a period of several weeks. It was suggested to Hunt that he should take independent advice but he declined. Hunt died six weeks after executing the conveyance and his personal representatives sought to have the conveyance set aside. It was upheld, however, by Lord Cranworth, L.C., whose judgment was affirmed in the House of Lords. Lord Cranworth said (q) that where there was no fiduciary relationship, "if a purchase has been obtained, and the person from whom it has been obtained seeks to set it aside, the burden of proof is upon him to show that he has been imposed upon, and it is not for him to say 'I had no professional adviser', unless he can show there has been contrivance or management on the part of the person who was dealing with him, and whose transaction of purchase is sought to be set aside, to prevent him having that advice".

§ 108. Non-Disclosure and Undue Influence in Cases of Fiduciary Relation

Having now dealt separately with non-disclosure and with undue influence as grounds of the invalidity of contracts made between

(n) At p. 322.

(o) See also *Rees v. De Bernardy*, [1896] 2 Ch 437.

(p) (1860) 6 De G. M. & G. 424; 43 E. R. 1298; 8 H. L. Cas 481; 11 E. R. 517.

(q) 6 De G. M. & G. 433; 43 E. R. 1301.

strangers in the absence of any antecedent fiduciary relation between the parties, it remains to consider how the law on this matter is affected by the existence of such a relation. This is a special branch of equitable jurisdiction, as to which the common law of fraud and duress knew nothing. This equitable doctrine has its most important application, not in the case of contracts, but in the case of dispositions of property, whether by way of gift or otherwise, between persons standing in a fiduciary relation to each other. It applies also, however, to contracts made between such persons, and it calls accordingly for some consideration in this place.

By a fiduciary relation is meant any relation of confidence or of authority which is of such a nature that the law recognises a duty on the part of him in whom the confidence is reposed, or the authority is vested, to use his position for the benefit of the other party, and not to abuse it for his own. By confidence is meant any form of trust or reliance, and by authority is meant any form of power, control, dominion, or personal influence. The person in whom such confidence is reposed, or in whom such authority is vested, may be distinguished as the *superior* or *dominant* party to the fiduciary relation; while he who so places his trust, confidence, or reliance in the other, or who is thus subject to the authority, power, dominion, or influence of the other, may be distinguished as the *subordinate* or *inferior* party.

The dominant party is, by virtue of his special position, precluded from the right of treating the subordinate party as a mere stranger, and of taking all such advantage of his ignorance, folly, error, weakness, or necessities as might lawfully have been taken, in accordance with the ordinary law of contracts, if he had been a stranger. The dominant party must, on the contrary, recognise that he stands towards the other in a position of guardianship, and is bound to take care of his interests as if they were his own (r). If he wishes to make a contract with the person so related to him he must not merely abstain from fraud and active misrepresentation, he must give him fully and freely the benefit of all material knowledge possessed by himself, and he must abstain from using for his own purposes the authority, power, or influence which he possesses (s). Any breach of the duty of guardianship

(r) Cf. *per* Lord Cranworth, L.C., in *Savery v. King* (1856), 5 H. L. C. 627, 656; 10 E. R. 1046, 1058.

(s) *Hoghton v. Hoghton* (1852), 15 Beav. 278, 299—300; 51 E. R. 545, 553; *McPherson v. Watt* (1877), 3 App. Cas. 254, *per* Lord O'Hagan, 266, and Lord Blackburn, 270—1.

which is thus incident to a fiduciary relation will invalidate any contract or other transaction between the parties, even if the like contract or transaction would have been valid as between strangers. When the dominant party thus betrays the confidence placed in him by using his superior knowledge for his own benefit, instead of for that of the other, the contract is invalid for non-disclosure (*t*). When, on the other hand, he abuses the authority possessed by him by using it for his own purposes, instead of for the benefit of the other, the contract is invalid for undue influence (*u*).

Kinds of Fiduciary Relations. Fiduciary relations are of two kinds. The first consists of those relations which are known to the law itself as being of a fiduciary character. The law knows their nature, and knows that they are such as to involve the requisite element of confidence or authority. No evidence is required as to the actual existence of these elements in the particular instance. Fiduciary relations of this kind are, for example, those which exist between a trustee and his beneficiary (*x*), an agent and his principal (*y*), a solicitor and his client (*z*), a physician and his patient (*a*); a spiritual superior and those under his control (*b*), a parent and a child (*c*). In the other class of case, the requisite fiduciary element is not such that the law will take notice of it, and its existence must be proved in the individual case. It may be shown by evidence that one person has in fact acquired such a dominating influence over another, or is in fact so far the trusted adviser and confidant of another, that a fiduciary relation has come into existence between them which brings with it the same duty of guardianship as exists in cases of the first type (*d*). A brother, for example, may be proved to stand in such a relation to his sister, and an educated man to one who is ignorant and has relied upon him as his trusted adviser. It must not be supposed, therefore, that the doctrine of fiduciary relation is limited to any defined and closed list of specified relations recognised by law. On the contrary, the doctrine is general in its application; it extends to every case in

(*t*) *E.g.*, *Dougan v. Macpherson*, [1902] A. C. 197.

(*u*) *E.g.*, *Lyon v. Home* (1868), L. R. 6 Eq. 655.

(*x*) *Coles v. Trecothick* (1804), 9 Ves 234; 32 E. R. 592.

(*y*) *Dally v. Wonham* (1863), 33 Beav. 154, 55 E. R. 326.

(*z*) *Wright v. Carter*, [1903] 1 Ch. 27.

(*a*) *Dent v. Bennett* (1835), 7 Sim 589; 58 E. R. 944; (1839), 4 My. & Cr. 269; 41 E. R. 105.

(*b*) *Allcard v. Skinner* (1887), 36 Ch. D. 145.

(*c*) *Hoghton v. Hoghton* (1852), 15 Beav. 278; 51 E. R. 545.

(*d*) *Smith v. Kay* (1859), 7 H. L. C. 751; 11 E. R. 299, *per* Lord Kingsdown, 779, E. R. 310-1; *per* Lord Cranworth, 770-71, E. R. 307-8.

which confidence is reposed and betrayed, or in which authority is possessed and abused (e).

We see, then, that the existence of an antecedent fiduciary relation between the parties has the effect of extending the law of non-disclosure and of undue influence to include much which would not fall within it in the case of contracts made between strangers—to include, that is to say, every betrayal of confidence reposed in the dominant party, and every abuse of the authority and influence possessed by him. This, however, is not all, for there is still a further legal consequence of the existence of such a relation between the parties. When a contract or other transaction takes place between them, the law in many cases lays upon the dominant party the burden of proving that it is not improperly induced by him. In the absence of such proof the law presumes that the contract or other transaction is the outcome of some fraud, misrepresentation, non-disclosure, or undue influence on the part of the dominant as against the subordinate party. In the absence of a fiduciary relation the burden of proving any such ground of invalidity would lie upon him who alleged it, but for the better protection of the subordinate party to a fiduciary relation this rule is reversed. Indeed, in the absence of such a presumption against the validity of such transactions, the law would in many cases be powerless to afford adequate protection against the subtler forms of fraud, betrayal of trust or confidence, and abuse of power, authority, or personal influence.

In *Parfitt v. Lawless* (f) the rule is thus formulated by Lord Penzance: “In equity persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.”

Husband and Wife. It is to be observed, however, that in thus including the relation of husband and wife among those

(e) *Tate v. Williamson* (1866), L. R. 2 Ch. 55, per Lord Chelmsford, L.C., 61.

(f) (1872), L. R. 2 P. & D. 462, 468.

fiduciary relations in which there is a presumption of undue influence Lord Penzance spoke inadvertently. It is now well settled that in this case there is no such presumption for "it is clear that business could not go on if in every transaction by way of gift by a wife to her husband the onus were on the husband to show that the wife had had independent advice", and any such presumption has become the less tenable since the legislation which has extended so greatly the sphere of married women's property (g). Nevertheless, it may be proved as a fact that a husband did in any particular case, and with respect to any particular transaction, stand to his wife in a relation of confidence or dominion, in which event a presumption of undue influence will arise and require to be rebutted by the husband if the transaction is to be sustained (h).

Other Fiduciary Relations. This presumption of undue influence or other abuse of a position of confidence or authority does not in truth apply absolutely and invariably to every case in which a fiduciary relation exists. It is made only in respect of such relations and transactions as are of such a nature as to make the presumption a reasonable and proper one for the effective protection of the subordinate party. In all other cases it is necessary to prove affirmatively some actual betrayal of confidence or abuse of influence. In *Coomber v. Coomber* (i) it is said by Cozens-Hardy, M.R.: "I do not think it is true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift. . . . There are confidential relations in which there is a presumption of undue influence. Take the common case of solicitor and client. A solicitor cannot, in ordinary circumstances, take a gift from his client in a matter in which he is the solicitor, because there is from that relationship in itself a presumption of undue influence; a presumption which, of course, may be rebutted. . . . Another instance is, of course, where a young person, whether male or female, immediately after attaining twenty-one, makes a gift to a parent or a person standing *in loco parentis*. When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and every relation of confidence is, I venture to think, not according to any

(g) *Howes v. Bishop*, [1909] 2 K. B. 390, 394, 402.

(h) *Bank of Montreal v. Stuart*, [1911] A. C. 120.

(i) [1911] 1 Ch. 723, 726-7.

authority and distinctly contrary to principle.” In the same case it is said by Buckley, L.J., (*k*): “This doctrine of equity does not rest upon the existence of a fiduciary relationship whatever be its nature. It rests upon the existence of such a fiduciary relationship as will lead the Court to infer undue influence, or knowledge in the one party concealed from the other, or other circumstances into which I need not go” (*l*).

Independent Legal Advice. This presumption of undue influence or other impropriety of conduct may, of course, be rebutted. But in certain classes of cases the law has gone further than the mere establishment of a rebuttable presumption; it has established a subsidiary rule determining the only method in which it is possible to rebut the presumption. In such cases the presumption cannot be rebutted except by proving that the subordinate party had, in respect of the transaction in question, the benefit of the competent independent advice of some third person. It is only by the intervention of this *consilium tertii*—the protection of an impartial third person standing between the two parties to the fiduciary relation—that the transaction can be effectually saved from the destructive operation of the legal presumption of undue influence. Thus a solicitor who takes a gift from his client cannot rebut the presumption against him merely by proving that he himself made full disclosure, and gave adequate and proper advice to his client, and made no improper use of his influence over him. It is essential that, in addition to this, he must prove that his client had the protection and benefit of independent legal advice (*m*). The precise scope of this subsidiary rule as to the necessity of *consilium tertii* is still a matter of some uncertainty, and it would not be profitable here to discuss the matter (*n*).

(*k*) At pp. 730-1.

(*l*) See also *Smith v. Kay* (1859), 7 H. L. C. 751; 11 E. R. 299; *per* Lord Cranworth, 771, E. R. 308.

(*m*) *Liles v. Terry*, [1895] 2 Q. B. 679.

(*n*) A recent and important case on this matter is *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A. C. 127, where a Malay woman, of great age and wholly illiterate, executed a deed of gift of landed property in favour of her nephew, who had the management of all her affairs. The case was one, as the Privy Council held, in which a presumption of undue influence arose and it was contended for the donor appellant that that presumption could be rebutted only by the proof of a sufficient *consilium tertii*. This contention, however, the Privy Council would not accept without qualification, although they decided that in fact the presumption had not been rebutted by the respondent. They said (p. 135): “But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove

§ 109. Relief in Cases of Non-disclosure and Undue Influence

Non-disclosure and undue influence, like innocent misrepresentation, do not give rise to claims for damages but merely render the contract voidable (o). Moreover, just as the invalidating operation of misrepresentation is based on the imperfection of the assent apparently expressed by the party seeking to rescind, so likewise is the operation of non-disclosure (except in the case of contracts *uberrimæ fidei*) and of undue influence. In the case of misrepresentation the assent of the party seeking to rescind is invalidated because the truth is misrepresented to him; in the case of non-disclosure because the truth is not told to him; in the case of undue influence because, even though he knows the truth, he is not at liberty to act upon it. In each of these cases the law considers it insufficiently certain that if the party seeking to escape from the contract had known the truth and been free to act upon it he would have entered into the contract. It might be anticipated, therefore, that in each case the same remedy should be available on the same terms. And this appears, in fact, to be the position. The principles which have been already stated in reference to rescission for misrepresentation appear to be largely applicable to cases of non-disclosure (other than cases *uberrimæ fidei*) and undue influence (p). Thus the principle of *restitutio in integrum* applies (q); and unless this principle can be satisfied, the party claiming rescission, whether for misrepresentation, non-disclosure, or undue influence, must fail in his suit (r).

this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton, L.J. [*viz*, 'that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will'], and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."

(o) *Morrison v. Universal Marine Insurance Co.* (1873), L. R. 8 Ex. 197; *Allcard v. Skinner* (1887), 36 Ch. D. 145, *per* Lindley, L.J., 186

(p) Spencer Bower, *Actionable Non-Disclosure* (1915), 197, n. (d).

(q) *Savery v. King* (1856), 5 H. L. C. 626; 10 E. R. 1046, *per* Lord Cranworth, L.C., 666-7, E. R. 1063; *Fry v. Lane* (1888), 40 Ch. D. 312, 325; *Thomson v. Weems* (1884), 9 App. Cas. 671, *per* Lord Blackburn, 682.

(r) *Re Worssam* (1882), 51 L. J. Ch. 668. See pp 263 *et seq.*, *ante*.

In cases where a contract is voidable for non-disclosure simply as being a contract *uberrimæ fidei*, however, the position is in some respects different. In such cases the party's right to rescind arises in virtue of a condition of the contract (or in the case of marine insurance in virtue of a statute reproducing the result formerly produced by the implication of such a condition); and this condition is not qualified or limited in its operation by the doctrine of *restitutio in integrum* (s). Nevertheless, where a contract of insurance is rescinded by the insurer for non-disclosure the assured may, unless the contract otherwise provides, recover back as money paid on a consideration which has wholly failed any premiums he may have paid (t).

(s) Macgillivray, *Insurance Law* (2nd ed.), 463.

(t) *Ibid.* 960-1.

CHAPTER XIII

INCAPACITY OF PARTIES

§ 110. Persons whose Contractual Capacity will be Considered

A contract may be invalid because of the incapacity of one or both of its parties. In this chapter we shall consider the contractual capacity of the following classes of persons: infants, lunatics, drunken persons, married women, aliens, foreign states and ambassadors, and corporations. The contractual incapacities of the first three classes are based on mental incapacity; but such contractual incapacities as affect the other classes cannot be subsumed under any similar general head.

§ 111. Infants

An infant or minor is a natural person who has not attained the age of twenty-one years (*a*). For legal purposes a person ceases to be an infant and becomes of full age at the beginning of the day immediately preceding his twenty-first birthday (*b*).

Infancy, in the case of a young child, involves lack of understanding, and doubtless if such a child has gone through the form of becoming a party to an act in the law to the validity of which his assent is essential that act in the law will be entirely void (*c*). After an infant has passed this age of lack of understanding, however, he is still regarded by the law as deficient in judgment, and accordingly his acts in the law, while not generally void *ab initio*, do not generally operate against him in the same complete and absolute way as they would if he had been of full age when he performed them. In particular the extent to which his contracts bind him is greatly modified.

The condition of infancy is not a novelty and one might have expected that the rules as to an infant's capacity to contract would long since have been reduced to a precise and final form. This, however, is far from being so; and on important points the authorities are incomplete or obscure and the commentators speak with

(*a*) Co. Litt. 2 b, 78 b, 171 b; 4 Bac. Abr., tit. Infancy and Age, (A), (7th ed.), p. 335. For the history of the matter see Holdsworth, *History of English Law* (3rd ed.), vol. 3, p. 510.

(*b*) *Re Shurey, Savory v. Shurey*, [1918] 1 Ch. 263.

(*c*) See *Johnson v. Clark*, [1908] 1 Ch. 303. 311-2, *per* Parker, J.

discordant voices. Nor did the Legislature, when it passed the Infants Relief Act, 1874, greatly help this aspect of the matter, for that Act has brought its own crop of doubts and uncertainties.

Not the least important of the causes of this unsatisfactory position is the inexact use in the authorities of the words void and voidable. Void is frequently used, especially in the older books, when what is meant is simply that a party who has contracted with an infant may be successfully met by the plea of infancy. Voidable, which strictly means good until disaffirmed (*d*), is often used in reference to infants' contracts to mean void unless ratified after majority (*e*). A similar ambiguity lurks in such phrases, common in the cases, as that the infant, upon attaining majority, may elect to affirm or disaffirm the contract. This may mean that the contract binds the infant unless disaffirmed after majority, or that it will not bind him unless after majority he affirms it.

In view of these difficulties the following statement of the position is offered with diffidence. In dealing with the matter we shall consider first, the extent to which at common law and in equity a contract could be enforced where one of the parties was an infant when he entered into it; secondly, the effect of the Infants Relief Act, 1874; thirdly, remedies by way of restitution available to the parties when a contract is avoided for infancy; and fourthly, the liability of an infant for torts connected with his contracts.

(I) Extent to which, at Common Law and in Equity, a Contract Could be Enforced Against One who Entered into it as an Infant.

(i) *Necessity for Ratification.* In general a contract bound an infant at common law only if he affirmed it after attaining full age. Unless he did this, his plea of infancy was a complete answer to any action brought against him on the contract. It was not the general rule of the common law that an infant's contracts bound him unless disaffirmed before, or within a reasonable or any other time after, majority (*ee*).

(*d*) *Duncan v Dixon* (1890), 44 Ch. D. 211, 213; see p. 29, *ante*.

(*e*) So Anson, *Contract* (18th ed.), 119.

(*ee*) *Nash v. Inman*, [1908] 2 K. B. 1, *per* Buckley, L.J., 12; *Williams v. Moor* (1843), 11 M. & W. 256; 152 E. R. 798. The latter case was an action of debt for work and materials and goods sold and delivered, with a count on an account stated. To the plea of infancy there was a replication of ratification after attaining full age. The Court of Exchequer clearly regarded the alleged ratification as an essential part of the cause of action and not merely of value as evidence that the defendant had elected not to disaffirm the contract, for they discussed (pp. 263-4; E. R. 801-2) the question of whether the ratification operated "to set up and give validity to the

It appears to be the better opinion that there were no cases at common law in which merely on the ground of infancy an infant's contract was void to such an extent that he could not effectively ratify it upon attaining majority. It is true that some general *dicta* which seem to indicate a contrary opinion can be found (f). Specifically it has at different times been said that trading contracts, accounts stated and penalty bonds entered into by infants were at common law incapable of ratification by the infant after he had come of age. But it was settled by the Court of Exchequer Chamber in *Bruce v. Warwick* (g) that this was not the law in respect of trading contracts; and a like decision was given by the Court of Exchequer in respect of accounts stated in *Williams v. Moore* (h). "The general doctrine is", said Parke, B., who delivered the Court's judgment, "that a party may, after he attains his age of twenty-one years, ratify and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract." With respect to penalty bonds the Court of King's Bench did decide in *Baylis v. Dineley* (i) that an action of debt could not be maintained even where the obligor ratified the bond after attaining majority. The true ground of this decision, however, was that a deed could only be confirmed by an instrument of as high a nature as itself and not by parol. "Unless there be something amounting to an estoppel in law of as high authority as the deed itself," said Lord Ellenborough, C.J., "we cannot surrender the interests of the infant into such hands as he may chance to get. It appears to me that we should be doing so in this case, unless we required the act after full age to be of as great solemnity as the original instrument."

otherwise invalid contract", or whether the liability arose wholly on the ratification regarded as a new contract. Moreover, although the infant came of age on December 10, 1837, and the action had not been commenced on September 27, 1839, it was not suggested that the defendant should be held liable because he had not disaffirmed during this period. See also *Thornton v. Illingworth* (1824), 2 B. & C. 825; 107 E. R. 589, and *Hartley v. Wharton* (1840), 11 A. & E. 934; 113 E. R. 669, both actions for goods sold and delivered. In the latter case the defendant came of age on January 9, 1832. He was alleged to have ratified the debt on April 23, 1833. When the action was commenced does not appear but it was tried in 1838. It was argued by the defendant that his ratification was insufficient for various reasons. There was no contention on the part of the plaintiff, however, that inasmuch as the defendant had not disaffirmed (whether by a plea of infancy or otherwise) before or within a reasonable time of coming of age, he was liable even although the alleged ratification were not established.

(f) E.g., per Lindley, M.R., in *Viditz v. O'Hagan*, [1900] 2 Ch. 87, 97.

(g) (1815), 6 Taunt. 118; 128 E. R. 978.

(h) (1843), 11 M. & W. 256, 266; 152 E. R. 798, 803.

(i) (1815), 3 M. & S. 477; 105 E. R. 689.

It will be observed that the common law rule we have stated was really compounded of two rules. The first was that an infant's contract was not in general binding on him in its inception. This is still the law. The second was that a contract might be rendered binding on a party who entered into it when an infant if he ratified it after attaining his majority. This aspect of the common law rule has, as we shall see (*k*), been greatly modified by statute.

To the general rule that a contract in its inception does not bind an infant party certain exceptions have been recognised by the common law, while in one instance equity has imposed a measure of liability upon the infant. These common law exceptions and the equitable addition to the rules are indicated in the next three succeeding sub-sections [(ii), (iii), (iv)].

(ii) *Cases in which Infant is Bound Unless he Repudiates.* Where an infant acquires property to which the performance of continuous or recurring contractual obligations is incident he is bound by those obligations unless and until he repudiates them by disclaiming the property (*l*). Likewise, where he enters into a contract constituting a continuing relationship—i.e., a relationship involving continuous or recurring rights and duties—between the parties, such as those involved in partnership (*m*), or in being a shareholder in a company (*n*), he is bound until he repudiates. So also where an infant executes a settlement under which payments are to be made to him from time to time, and which contains covenants on his part, as, e.g., a covenant to settle after-acquired property, he will be bound in the absence of disclaimer (*o*).

Such a repudiation or disclaimer must be made before or within a reasonable time after the attaining of majority (*p*). A disclaimer made before majority, however, is not final, but may be withdrawn within a reasonable time of attaining majority (*q*).

A valid repudiation discharges the infant not merely of future liabilities, but also of those which have already accrued due, such as arrears of rent under a lease or calls already made or payable in respect of shares (*r*).

(*k*) See pp. 311 *et seq.*, *post*.

(*l*) *North Western Ry. v. M'Michael* (1850), 5 Ex. 114, 126 ff.; 155 E. R. 49, 55.

(*m*) *Lovell & Christmas v. Beauchamp*, [1894] A. C. 607, 611.

(*n*) *North Western Ry. v. M'Michael*, *cit. supra*.

(*o*) *Carter v. Silber*, [1892] 2 Ch. 278; affirmed *sub nom. Edwards v. Carter*, [1893] A. C. 360.

(*p*) *Ibid*.

(*q*) *Newry and Enniskillen Ry. v. Coombe* (1849), 3 Ex. 565, 575; 154 E. R. 970, 974.

(*r*) *North Western Ry. v. M'Michael* (1850), 5 Ex. 114, 125; 155 E. R. 49, 54.

A mere plea of infancy is not of itself a sufficient repudiation. "When a person is sued upon obligations arising out of property which he has become possessed of under a contract, as shares in a company, he cannot avoid the obligation by the simple plea that he was an infant at the time of acquiring the property, but must further plead that within a reasonable time in that behalf after coming of age he repudiated the contract on that ground, and disclaimed the property" (s). It is presumably a sufficient repudiation, however, to plead that the defendant was an infant when he entered into the contract, and now, being within a reasonable time of his having attained majority, by his defence he repudiates all liability and disclaims all rights under the contract.

(iii) *Contracts for Necessaries*. Contracts entered into by infants in regard to necessaries have been specially dealt with by the common law, and in one respect the common law rules have been extended by equity. It is thought that the effect of the authorities may be stated in the following propositions.

(a) Where an infant has contracted in respect of necessaries provided or to be provided for him, and the contract as a whole is for his benefit, he is liable on the contract as fully as an adult would be.

(b) If an infant's contract for necessaries should not be for his benefit, then at common law it would come under rule (i), so that the infant would be liable under it only if he ratified it after attaining majority.

(c) If one, who as an infant actually accepts necessaries rendered or supplied pursuant to a contract with him, is by reason of infancy (but not also by reason of lack of understanding) not liable on the contract, he will nevertheless be liable quasi-contractually to pay a reasonable sum for what he has accepted.

(d) At common law a loan raised by an infant for the purpose of buying or paying for necessaries is in the same position as any other loan and not regarded as itself a necessary; for "It may be borrowed for necessaries, but laid out and spent at a tavern" (t). If the money is in fact applied in paying for necessaries, however, equity allows the lender to stand in the place of the supplier of the necessaries and recover from the infant to the extent that the supplier could have recovered (u).

(s) *Bullen & Leake, Pleadings* (3rd ed.), 605; *North Western Ry. v. M'Michael, and Newry and Enniskillen Ry. v. Coombe*, cit. *supra*.

(t) *Earle v. Peale* (1711), 1 Salk. 386; 91 E. R. 336.

(u) *Re National Permanent Benefit Building Society* (1869), L. R. 5 Ch. 309, 313; *Lewis v. Alleyne* (1888), 4 T. L. R. 560.

(e) Where a person provides necessaries for an infant otherwise than by way of gift and the infant is so young as to lack any real understanding of what may be necessary for him, the person so providing the necessaries will be entitled to recover from the infant a reasonable sum in respect of them (x).

With respect to the foregoing propositions as to necessaries, the following questions require particular discussion. What are necessaries? When is a contract for the infant's benefit? Is the liability of an infant who has entered into a beneficial contract for necessaries contractual or quasi-contractual?

WHAT ARE NECESSARIES? A frequently quoted definition is that in Coke upon Littleton (y): "An infant may bind himself to pay for his necessary meat, drinks, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards . . .". A distinction appears to be made in this passage between contracts for necessaries and contracts for instruction. Since Sir Edward Coke's time other contracts have been recognised as standing with contracts for education or instruction, *viz.*, contracts of apprenticeship (z) (which are partly for instruction and partly for employment) and contracts of service or employment (a). Contracts for instruction or education, apprenticeship and employment contracts, are sometimes described as contracts for the infant's benefit to distinguish them from contracts for necessaries *stricto sensu*. This distinction, however, does not seem to correspond with any distinction in the legal principles applicable to the two classes of contracts. Moreover, the use of the term benefit in this context is confusing because, as we shall presently see, it is also used in quite a different sense in relation to infants' contracts. Therefore, following a usage which, in regard to apprenticeship and education contracts, at any rate, has abundant judicial sanction (b), we shall employ the term necessaries to include both necessaries *stricto sensu* and those things which may be the subject-matter of benefit contracts. It is in this sense that we have used the word in propositions (iii) (a), (b), (c), (d), and (e) above.

Necessaries are such things as, having regard to the infant's social and financial position, it is reasonable that he should be

(x) *Re Rhodes* (1890), 44 Ch. D. 94, see p. 107; *Nash v. Inman*, [1908] 2 K. B. 1, 8.

(y) P. 172 a.

(z) *De Francesco v. Barnum* (1890), 45 Ch. D. 430.

(a) *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

(b) *Walter v. Everard*, [1891] 2 Q. B. 369; *Cadd v. Thompson*, [1911] 1 K. B. 304, 308; *Roberts v. Gray*, [1913] 1 K. B. 520.

permitted to pledge his credit to acquire. "And as-is accurately stated by Parke, B., in *Peters v. Fleming* (c), 'From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is; . . . ' . . . We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessities" (d). The law has been similarly laid down in respect of education and apprenticeship contracts. "I have no doubt the proper education of an infant stands in the same position under English law as food and clothing supplied to him" (e). "You must have regard to the condition of the infant in life—whether, for instance, he is a young man who will have to earn his living by his own exertions" (f).

That a thing should be a necessary to an infant implies that he should not at the relevant time be sufficiently supplied with such things (g). The relevant time would seem to be the time at which the infant is alleged to have contracted or otherwise become liable for the things (h). If his liability is alleged to arise, whether contractually or quasi-contractually, from the acceptance of an executed consideration the time of this acceptance will be the relevant time. Accordingly section 2 of the Sale of Goods Act, 1893, provides that "'Necessaries' . . . mean goods suitable to the condition of life of such infant . . . and to his actual requirements at the time of sale and delivery". What the position is where the contract relates to delivery in the future is not so clear. The reasonable view, it is suggested, is that things ordered for delivery at a future date should be regarded as necessities if that date is not unreasonably remote and the infant has no reasonable

(c) (1840), 6 M. & W. 42, 46; 151 E. R. 314, 315.

(d) Willes, J., delivering the judgment of the Exchequer Chamber in *Ryder v. Wombwell* (1868), L. R. 4 Ex. 32, 38.

(e) *Walter v. Everard*, [1891] 2 Q. B. 369, per Fry, L.J., 376.

(f) *Ibid.*, per Lord Esher, M.R., 374.

(g) *Barnes v. Toy* (1884), 13 Q. B. D. 410; *Johnstone v. Marks* (1887), 19 Q. B. D. 509 (Lord Esher, M.R., Lindley and Lopes, L.JJ., sitting as a Divisional Court); *Nash v. Inman*, [1908] 2 K. B. 1.

(h) See form of replication in Bullen & Leake, Pleadings (3rd ed.), 606

ground for anticipating that he will have been sufficiently supplied from other sources by that date. Thus if an infant orders a suit of clothes from a tailor and while it is being made the infant's parents, without telling him beforehand and not in accordance with any past practice, send him a suit, it does not seem just or reasonable that the tailor should be unable to recover because the infant is now sufficiently supplied with clothes (i).

The principle that a thing is a necessary only if the infant is not otherwise adequately supplied may apply to a contract for education. "If the infant can obtain the education which he requires in another way, it may not be a necessary" (k). So if an infant's social and financial position were such that the education available at a free Government or local authority school would be suitable and adequate, education by private tutor or at a school charging fees would presumably not be a necessary.

Whether in any particular case a thing is a necessary is a mixed question of law and fact (l). As a matter of law things are either such as could not in any circumstances be necessities (m), those which could be necessities in special circumstances (n) if the infant were not already sufficiently supplied, and those which, being in quantity and quality only what may be requisite for bare subsistence, could not be otherwise than necessities (o) if the infant were not already sufficiently supplied. If the things are of the first kind, the Court should enter judgment for the infant without sending the case to the jury. If they are of the second kind the same course should be followed unless there is reasonable evidence of special circumstances and inadequate supply. If they are of the third kind the Court should enter judgment for the plaintiff provided that either the defendant admits inadequate supply, or the evidence of inadequate supply is so overwhelming that a verdict for the defendant would be set aside as against the weight of evidence (p),

(i) Cf. 58 L. Q. R. pp. 82 ff.

(k) Lord Esher, M.R., in *Walter v. Everard*, [1891] 2 Q. B. 369, 374

(l) *Ryder v. Wombwell* (1868), L. R. 4 Ex. 32, 38.

(m) "Suppose the son of the richest man in the kingdom to have been supplied with diamonds and racehorses, the Judge ought to tell the jury that such articles cannot be necessities." Coleridge, J., in *Wharton v. Mackenzie* (1844), 5 Q. B. 606, 612; 114 E. R. 1378, 1380

(n) *Ryder v. Wombwell*, at p. 40-1; *Wharton v. Mackenzie*, *ubi supra*; *Elkington & Co., Ltd. v. Amery*, [1936] 2 A. E. R. 86

(o) See *per* Bramwell, B., dissenting from the majority of the Court of Exchequer in *Ryder v. Wombwell* (1868), L. R. 3 Ex. 90, 96. The judgment of the majority was afterwards reversed by the Exchequer Chamber (L. R. 4 Ex. 32). Certain of the statements in the cited passage of Bramwell, B.'s, judgment should be read in the light of the remarks of the Exchequer Chamber in L. R. 4 Ex. at p. 41.

(p) See p. 75, *ante*.

or, there being evidence to go to the jury as to adequacy of supply, the jury finds that the supply was inadequate (q).

CONTRACT MUST BE FOR INFANT'S BENEFIT. Although a contract is for necessities it will not bind an infant unless it is also for his benefit (r). Whether the contract is for the infant's benefit is a question of law for the Court (s) and is to be determined having regard to the contract as a whole and not by regarding exclusively one or more individual terms. "Now I approach this subject with the observation that it appears to me that the question is this: Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial" (t).

Whether a contract is for the infant's benefit must be determined in the light of the circumstances as they appeared at the time it was entered into (u).

IS INFANT'S LIABILITY FOR NECESSARIES CONTRACTUAL OR QUASI-CONTRACTUAL? If a contract for necessities was not for the infant's benefit, it is clear that at common law it did not bind the infant unless he ratified it after majority. On the other hand there is no doubt that at common law a person who pleaded infancy to an action on such a contract was, in the absence of ratification after majority, liable *quasi ex contractu* to pay a reasonable price for such necessities as he had actually received (x). So also where

(q) *Ryder v. Wombwell* and *Wharton v. Mackenzie*, *cit. supra*; *Peters v. Fleming* (1840), 6 M. & W. 42; 151 E. R. 314; *Nash v. Inman*, [1908] 2 K. B. 1

(r) *De Francesco v. Barnum* (1890), 45 Ch. D. 430; *Flower v. L. & N. W. Ry.*, [1894] 2 Q. B. 65.

(s) *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

(t) Fry, L.J., in *De Francesco v. Barnum*, *supra*, p. 439; see also *Corn v. Matthews*, [1893] 1 Q. B. 310, 314. In *Mercantile Union Guarantee Corporation, Ltd. v. Ball*, [1937] 2 K. B. 498, the Court of Appeal held that a contract by an infant haulage contractor for a large and expensive lorry on onerous hire-purchase terms was not for his benefit.

(u) *Mackinley v. Bathurst* (1919), 36 T. L. R. 31.

(x) *Everett v. Wilkins* (1874), 29 L. T. 846. Cf. s. 2, Sale of Goods Act, 1893, quoted p. 308, *post*

an infant entered into an entire contract which included not only necessities but also a substantial proportion of unnecessary things he could not be made liable on the contract as such and apart from any ratification as it was not a contract for necessities (y); but for such of the necessities as he actually received he was liable *quasi ex contractu* to pay a reasonable price. It is sometimes said, however, that in all cases where an infant was at common law liable for necessities (otherwise than by reason of ratification after full age) his liability was quasi-contractual and not contractual, and that accordingly an infant's liability for necessities is in all cases quasi-contractual even to-day.

In support of this view the *obiter dictum* of Fletcher Moulton, L.J., in *Nash v. Inman* (z) is commonly cited. "An infant," he said, "like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessities, the law will imply an obligation to repay him for services so rendered, and will enforce that obligation against the estate of the infant or lunatic." A lunatic's contracts, however, are often completely binding on him, and even when they are not, are generally not void but merely voidable. It is only where either there is no express contract or the lunatic has avoided the contract that a person providing necessities for a lunatic may recover quasi-contractually (a). The analogy of the lunatic, therefore, hardly supports the learned Lord Justice's statement if that statement is to be taken to mean that an infant can never be made liable for necessities except quasi-contractually. Such a statement would seem true only of an infant who is so young as to be unable to express any real assent (b). It seems abundantly clear, however, that where an infant who has attained to a sufficient degree of understanding to appreciate what he is doing enters into a beneficial contract for necessities, he will be bound contractually and not merely quasi-contractually.

In support of the view that liability in such cases is contractual may be offered authority both ancient and modern. In the early case of *Dale v. Copping* (c), "an action upon the case for a promise to pay such a sum of money to the plaintiff for a cure of the

(y) *Stocks v. Wilson*, [1913] 2 K. B. 235, 241-2.

(z) [1908] 2 K. B. 1, 8. See also the *obiter dictum* of Scrutton, L.J., in *Pontypridd Union v. Drew*, [1927] 1 K. B. 214, 220.

(a) See pp. 321 *et seq.*, *post*.

(b) See pp. 297, 302, *ante*.

(c) (1610), 1 Bulst. 39; 80 E. R. 743.

falling sickness", the defendant pleaded that he was an infant at the time of the promise. The Court, however, treated the case as one for necessities, and said quite explicitly that the defendant was liable on the promise. "... this shall be taken as a contract, and that to be for a thing in the nature of necessity to be done for him, and the same as necessary as if it had been a promise by him made for his meat, drink, or apparel, and in all such cases his promise is good, and shall bind him . . . and so in this case here his promise shall as well bind him. . . ." In the very case in which Fletcher Moulton, L.J., made his pronouncement, Buckley, L.J., in language which is so precise and explicit as to suggest that it was intended to be a refutation of Fletcher Moulton, L.J.'s, statement, placed the infant's liability in such cases squarely on the basis of express contract. "The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although he was an infant, had a limited capacity to contract" (d). Moreover, any other view would be in conflict with the decisions, chiefly in the Court of Appeal (e), in which the Court inquired whether the contract was for the infant's benefit or not. If, whether or not the contract were for the infant's benefit, he was not to be liable on the contract but only quasi-contractually, such an inquiry would have been otiose (f).

In one case, indeed, an infant cannot be sued upon his beneficial contract for necessities. This is the case of apprenticeship. Here, by reason of old authority which on a modern view is anomalous (g), an infant cannot be sued for damages for absentsing himself from his master's employment; nor can he be restrained by injunction from so doing (h). After the expiration of the apprenticeship, however, the former apprentice, if of full age, may be sued in respect of obligations arising out of the apprenticeship contract

(d) [1908] 2 K. B. p. 12.

(e) *De Francesco v. Barnum* (1870), 45 Ch. D. 430 (Fry, L.J.); *Corn v. Matthews*, [1893] 1 Q. B. 310 (C. A.); *Flower v. L. & N. W. Ry.*, [1894] 2 Q. B. 65 (C. A.); *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482 (C. A.), and *Roberts v. Gray*, [1913] 1 K. B. 520 (C. A.).

(f) Cf. Lord Hanworth, M.R., in *Doyle v. White City Stadium*, [1935] 1 K. B. 110, 123-6. See also *Fellows v. Wood* (1888), 59 L. T. 513, and *Evans v. Ware*, [1892] 3 Ch. 502. The contrary view is maintained in Pollock, *Contracts* (11th ed.), 47 n.

(g) Cf. *per* Phillimore, J., in *Gadd v. Thompson*, [1911] 1 K. B. at 308.

(h) *De Francesco v. Barnum* (1889), 43 Ch. D. 165. Where an infant is apprenticed to the business of a "workman", however, and the premium (if any) does not exceed £25, the provisions of the Employers and Workmen Act, 1875, will apply. See Halsbury, *Laws of England* (2nd ed.), vol. 22, p. 173.

other than the obligation to serve (i). Nevertheless, why he should not be liable, even during the apprenticeship and while an infant, in respect of any such obligations which in terms fall due during that period is not clear.

The opinion is sometimes expressed that while beneficial contracts for necessities in general may be completely binding, yet since the Sale of Goods Act, 1893, the position is otherwise in respect of necessary goods. Section 2 of the Sale of Goods Act provides, in part, as follows :

“Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property :

Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.”

In its application to infants this section is certainly not easy to construe. Its main purpose appears to be to preserve without alteration the general law of capacity in regard to the sale of goods. So far as concerns persons other than infants the proviso plainly does not break in on this general purpose, for it is carefully limited to those persons who because of mental deficiency are, quite apart from the operation of the section, incapable of contracting; the proviso does not itself render them so incapable. It would be somewhat surprising, therefore, to find that in respect of infants the proviso actually went so far as to abolish a capacity existing at common law. The better view, it is suggested, is that the proviso applies to infants only in so far as, apart from the section, they lack contractual capacity to bind themselves in respect of necessary goods, and therefore does not affect beneficial contracts for such goods entered into by infants of sufficient mental capacity to contract. Any other interpretation of the section would lead to grave difficulties. If the section were construed to exclude liability on the part of such an infant on a beneficial executed contract for the purchase of necessary goods, it would follow that the infant would have to pay a reasonable price for such goods although his contract happened to be at a much lower figure. And if this somewhat remarkable result were accepted further difficulties would arise. Either the proviso, which does not expressly refer

(i) *Walter v. Everard*, [1891] 2 Q. B. 369; *Gadd v. Thompson*, [1911] 1 K. B. 304; *Mackinlay v. Bathurst* (1919), 36 T. L. R. 31.

to executory contracts for necessary goods, would have to be regarded as by implication avoiding such contracts or at least providing that whatever the price stated in them they should be taken to be at a reasonable price, or the absurd result would follow that an infant, who had contracted for necessities at less than a reasonable price, would, so long as the contract was executory, be liable on that basis, but so soon as the contract was executed, would be liable on the basis of a reasonable, although higher, price. There seem, therefore, to be strong reasons for supposing that the section does not in any way modify in regard to goods the general principles as to an infant's liability on beneficial contracts for necessities (*k*).

It may be added that if an infant entered into a contract for necessities at a price exceeding what was reasonable, the principle that the contract must be for his benefit before it binds him would apply, and he could plead his infancy. Of course he would be liable to pay a reasonable price for any necessities that he had actually accepted.

(iv) *Contracts Beneficial to Infant*. Possibly any contract which the Court can pronounce beneficial to an infant may bind him.

In *Cowern v. Nield* (*l*) an infant trader was sued on a trading contract. The County Court Judge found as a fact that the contract was for the infant's benefit and accordingly held him liable, but a divisional Court (Phillimore and Bray, JJ.) reversed this decision on the ground that an infant was not liable on his contracts merely because they were for his benefit.

Cowern v. Nield must now, however, be read with *Doyle v. White City Stadium* (*m*), in the Court of Appeal. In this case, Doyle, an infant professional boxer, entered into a contract with the British Boxing Board of Control, whereby he accepted a licence from the Board on the terms that he would abide by the Board's rules. One of those rules provided for the stopping of boxers' money in the event of disqualification. Subsequently the plaintiff entered into a contract with a third party to box one Petersen on the terms that he (Doyle) was to receive £3,000, "win, lose, or draw". The match was under the auspices of the Board of Control. At the fight Doyle was disqualified, and the money, instead of being paid to him was, at the Board's request, paid to it.

(*k*) A different view is maintained in Pollock, Contracts (11th ed.), 61-2.

(*l*) [1912] 2 K. B. 419.

(*m*) [1935] 1 K. B. 110.

Doyle sued the Board to recover the money, and the Board pleaded its contract with him. To this Doyle replied that he was an infant. The Court of Appeal decided that the contract as a whole was for his benefit and held him bound by it. It is to be observed, as Lord Hanworth, M.R., pointed out (n), that no question of employment was involved. The infant had entered into the contract with the Board simply in order that he might obtain an opportunity to exercise his professional skill on his own account. Lord Hanworth seemed to consider that the contract was binding solely because it was beneficial to Doyle. Slessor and Romer, L.JJ., on the other hand, were more guarded, and considered that the case was covered by *Clements v. L. & N. W. Rly.* (o), where a contract had been upheld as being closely related to a contract of service between the same parties. Inasmuch, however, as Doyle did not enter into a contract of service either with the Board of Control or with any other person, it must be taken that these learned Lords Justices were prepared to extend the benefit principle to cases in which the contract related or was ancillary to the exercise of professional or trade skill by the infant on his own account.

The effect of this case is not easily assessed. But it may well be that Lord Hanworth's judgment will prove to be a signpost indicating the direction in which the law will develop; and that eventually the Courts will establish the simple and reasonable proposition that (apart from statute) an infant will be bound by all contracts entered into by him which are for his benefit. Such a rule would afford adequate protection to the infant and at the same time prevent injustice to those dealing with him on fair and reasonable terms (p).

(v) The power of relying on infancy as a defence to an action of contract is the infant's and not the other party's. Save in one respect the infant may enforce the contract to the same extent and

(n) At p. 126.

(o) [1894] 2 Q. B. 482.

(p) See further *Maddon v. White* (1787), 2 T. R. 159; 100 E. R. 86, described by Sir Frederick Pollock (Contract (10th ed.), p. 58; see also at p. 67) as "good English authority for the proposition that if a lease is beneficial to him [an infant] he cannot avoid it at all"; cf. *per* Slessor, L.J., in *Doyle v. White City Stadium*, [1935] 1 K. B. 110, 131, and *Mercantile Union Guarantee Corporation, Ltd. v. Ball*, [1937] 2 K. B. 498. The latter case was decided by the Court of Appeal (Scott, L.J., and Finlay, J., on appeal from the county court) on the ground that the contract was not beneficial to the infant. But the Court was also prepared to base its decision on the principle that there are only certain classes of beneficial contracts by which an infant may be absolutely bound *ab initio*.

on the same substantive conditions as any other person (*q*). The exception is that the infant cannot specifically enforce the contract against the other party, because (so it is said (*r*)) the remedy of specific performance is available to a party only where it would have been available to the other party at the inception of the contract (*s*).

(II) The Infants Relief Act, 1874.

The law as stated above has been modified by the Infants Relief Act, 1874. That act provides as follows :

“1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities) and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

“2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.”

Much difficulty has been experienced in construing this enactment, and it has frequently been the subject of adverse criticism. Sir Frederick Pollock once said that it was “So unskilfully framed that it became intelligible only by judicial interpretation” (*t*). In attempting to elucidate the meaning of its provisions we shall first consider section 2.

Section 2 is by its terms limited to cases where the action is founded upon a promise or ratification occurring after majority. That is, it applies only to cases coming under rule (I) (i) above. It has no application to cases coming under rule (I) (ii), because there the action is not founded upon any promise or ratification made after majority but upon the contract made during infancy

(*q*) *Holt v. Ward Clarendieux* (1732), 2 Stra. 937; 93 E. R. 954.

(*r*) See p. 599, *post*.

(*s*) *Flight v. Bolland* (1828), 4 Russ. 298; 38 E. R. 817. See also *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683; Fry, *Specific Performance* (6th ed.), 219.

(*t*) 2 Camb. L. J. 23.

and continuing good unless and until disaffirmed during infancy or within a reasonable time thereafter (u).

Section 2 does not say that the promises and ratifications to which it applies shall be void, but merely that no action shall be brought whereby to charge any person upon any such promise or ratification. Similar words in the Statute of Frauds have been held to render contracts merely unenforceable by action, leaving them good for certain other purposes (x). There is no reason to suppose that the words of section 2 have any different effect from this (y). Accordingly a contract entered into by an infant and ratified after he attained his majority could in certain circumstances be relied upon by the other party by way of defence (z). Again, the discharge of such a ratified contract is presumably a sufficient consideration to support a new contract (a). It would seem, indeed, that a debt owing on such a ratified contract would not be available by way of set-off. But originally this was because, among other reasons, the Statutes of Set-off were merely "intended to prevent cross-actions, and it was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action. . . ." (b). At the present time the Statutes of Set-off have been repealed and the matter is regulated by rules of Court, but the position appears to be the same, for rule 3 of Order XIX declares that a "set-off . . . shall have the same effect as a cross-action. . . ."

In applying section 2 the Courts have distinguished between a new contract and a ratification of the old contract. If after the infant has attained majority he enters into a new contract in no way connected with the contract made during his infancy except that to a greater or less extent he promises to do the same things as he promised in the earlier contract the new contract will be good despite the section. But if the erstwhile infant merely purports to recognise that the original contract binds him or, it would seem, promises to perform the original contract this is a mere ratification,

(u) *Carter v. Silber*, [1892] 2 Ch. 278, affirmed *sub nom. Edwards v. Carter*, [1898] A C 360; *Duncan v. Dixon* (1890), 44 Ch. D. 211.

(x) See p 184, *ante*

(y) Cf. *Kelly, C.B.*, in *Rawley v. Rawley* (1876), 1 Q. B. D. 460, 467, speaking of s 5 of Lord Tenterden's Act (9 Geo 4, c. 14), the forerunner of s. 2, and, so far as material to the present point, in almost the same terms: "the Act . . . does not say that such a promise shall have no legal effect whatever. . . ."

(z) Cf. p 184, *ante*

(a) As to Statute of Frauds, see p 185, *ante*.

(b) *Jessel, M R.*, in *Rawley v. Rawley* (1876), 1 Q. B. D. 460, 466.

and even though by deed or for valuable consideration is within section 2 (c).

Turning next to section 1 we shall consider first to what contracts it applies, and secondly its effect on those contracts.

There is no real reason for doubting that the section applies only to the three kinds of contracts which it specifically enumerates. The proviso to the section has sometimes been thought to create a difficulty, however. This proviso purports to exclude from the operation of the earlier part of the section any contracts "except such as now by law are voidable". Voidable must here mean not binding on the party contracting as an infant unless ratified by him after attaining full age. Assuming that no contract of loan, sale of goods (not being necessities) or account stated could, apart from the Act, be other than voidable in this sense, it is then argued that the earlier words of the section must be more extensive than *prima facie* they would appear to be; for otherwise there would be nothing upon which the proviso could operate. Two answers may be made to this. The first, which commended itself to Kekewich, J., in *Duncan v. Dixon* (d), is that, granting the assumption that none of the three specified contracts could be other than "voidable" apart from the Act, still the words of the earlier part of the section are quite clear, and do not admit of modification merely because of the difficulty of interpreting the later words. This argument gains additional force when it is remembered how often the Act has been stigmatised as ill-drawn. The second answer is that in any case the assumption that no contract falling within any of the three specifically mentioned classes could be valid and not "voidable" is false. A contract of loan was effective in equity where the moneys lent were used to pay for necessities (e). Such a contract was a contract into which an infant might by the rules of equity enter and was not such as was by law voidable. It would be merely hypercritical to say that such a case did not fit the proviso because the infant's liability was based on an equity arising out of the doctrine of subrogation and not on contract. If it were not for the contract of loan there would be no right of recovery arising by way of subrogation.

Accepting, then, that section 1 applies only to the three named contracts, what is its effect upon them? It declares them to be

(c) *Ditcham v. Worrall* (1880), 5 C. P. D. 410, especially *per* Lindley, J., 412-3; *Northcote v. Doughty* (1879), 4 C. P. D. 385; *Holmes v. Brierley* (1888), 4 T. L. R. 647; 36 W. R. 795; see also *Shipp v. Kelly* (1926), 42 T. L. R. 258.

(d) (1890), 44 Ch. D. 211, 215-6

(e) See p. 301, *ante*

void. Now apart from section 1 all of these contracts would fall under section 2, the operation of which is, as we have seen, to deprive the ratification of any contract to which it applies of part only, though certainly the most important part, of its common law effect. As, therefore, section 1 takes these contracts out of section 2 and uses the drastic word void it must clearly go further in invalidating them than section 2 would have. The least effect that can be attributed to section 1 is that it deprives of all legal efficacy whatever any purported ratification after full age of the several contracts to which it refers.

Does section 1 go further than this, and deprive the infant of the right which he had at common law of electing not to treat the contract as void but to enforce it as against the other party? In other words, does it enable the other party to plead that the plaintiff was at the time when the contract was made an infant? It would seem arguable that it does not. The act appears to have been passed for the protection of infants, not of those dealing with infants; and "In general . . . where the enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only, at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves . . ." (f). As was said by Lord Coleridge, C.J. (g): "No doubt the words of section 1 of the Infants Relief Act, 1874, are strong and general, but a reasonable construction ought to be put upon them." It would not seem reasonable that where an infant has entered into an advantageous bargain with a person of full age that person should afterwards be able to escape from his contract merely because he dealt with an infant (h).

(III) Remedies by Way of Restitution Available to Parties when Contract Void or Avoided for Infancy.

(i) *Infant's Right to Restitution at Common Law, and Under the Infants Relief Act.* At common law one who having entered into a contract as an infant elected to treat it as void could recover moneys paid to the other party only where he could set up a case of total failure of consideration (i). There would be such a total

(f) Maxwell, *Interpretation of Statutes* (6th ed.), 381; see also Stroud, *Judicial Dictionary*, *sub nom.* "Void".

(g) *Valentini v. Canali* (1889), 24 Q. B. D. 166, 167.

(h) Cf., however, Anson, *Contract* (18th ed.), 125.

(i) *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452, 458. Where the consideration for a promise is itself a promise, the phrase failure of consideration

failure of consideration where the party who had entered into the contract as an infant, not having taken a benefit under it, disaffirmed or elected not to affirm it. Thus in *Corpe v. Overton* (k) an infant contracted to enter into a partnership at a future date, and paid a sum of money by way of deposit and as part of the purchase price of the interest which he was to take in the intended partnership. Afterwards, and without having entered into the partnership, he rescinded the contract for infancy, and the Court of Common Pleas held that he was entitled to recover the deposit. It is to be observed that where a party obtains that which he bargained for there is no failure of consideration merely because what he thus obtains is valueless. As was said by Warrington, L.J., in *Steinberg v. Scala (Leeds) Ltd.* (l), "in the case of an infant plaintiff seeking to recover money paid, the question is not whether the infant has derived any real advantage from the contract. I cannot see myself, in the case of an action to recover money actually paid, any difference between the position of an infant and of an adult, and an adult can only recover money actually paid if there has been a total failure of consideration. In the present case the infant has received consideration which, from the evidence, is of value. But, whether it was valuable or not, she has received the very consideration for which she bargained". Thus, if an infant applied for and was duly allotted shares in a company he could not recover money paid in respect of those shares, even though they had no market value. But if the company had already allotted all its shares at the time when it purported to allot shares to the infant, the purported allotment would be a nullity, and the infant would be entitled to recover any money paid by him.

In the absence of any such total failure of consideration a person who avoids a contract on the ground of his infancy is not, at common law, entitled to recover money paid under the contract (m).

How does the matter now stand, however, in regard to those contracts declared to be void by the Infants Relief Act, 1874? This

means that the promisee has not received that which was promised. *Fibrosa v. Fairbairn, etc., Ltd.*, [1943] A. C. 32, 47, 72.

Money may be recovered for failure of consideration only where that failure is total, but this includes the case of the total failure of a severable part of a consideration provided that what was paid in respect of that part is ascertained or ascertainable with precision. *Ibid.* 47, 65, 77; *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312. See also note (z) at p. 548, *post*.

(k) (1833), 10 Bing. 252; 131 E. R. 901.

(l) [1923] 2 Ch. 452, 462.

(m) *Holmes v. Bloggs* (1818), 8 Taunt. 508; 129 E. R. 481; *Ex p. Taylor* (1856), 8 De G. M. & G. 254; 44 E. R. 388.

question was considered by Lord Coleridge, C.J., and Bowen, L.J., sitting as a Divisional Court in *Valentini v. Canali* (n). In that case the plaintiff, being then an infant, had entered into a contract to become tenant of a house and to pay £102 for the furniture therein. He paid £68 on account, gave a promissory note for the balance due on the furniture, and entered into possession of the premises. Subsequently he brought an action claiming a declaration that the contract was void, cancellation of the promissory note, and repayment of the £68. The Divisional Court held that the contract should be set aside and the promissory note cancelled, but refused to order repayment of the £68. With respect to the £68, however, the Court did not say that they were applying the common law rule that recovery could not be had unless there were a total failure of consideration, although if, despite the Act, that rule had been applicable, it would have been a complete answer to the plaintiff's claim. On the contrary the Court clearly considered that the question turned on the Act, and Lord Coleridge, C.J. (in whose judgment Bowen, L.J., concurred), thus stated his reasons for refusing to order repayment of the £68: "Where an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. *He could not give back this benefit or replace the defendant in the position in which he was before the contract.*" From the words we have italicised it would appear to have been the Court's opinion that the effect of the Act was to enable an infant to recover not merely where there was a total failure of consideration but also where he could make *restitutio in integrum* (o). It is true that in *Pearce v. Brain* (p), also before a Divisional Court, Swift, J. (in whose judgment Acton, J., concurred), said that *Valentini v. Canali* was "direct authority that money paid under a void contract cannot be recovered unless there is a total failure of consideration". It is difficult, however, to reconcile this with the italicised passage quoted from Lord Coleridge's judgment.

(ii) *Infant's Right to Restitution in Equity.* In respect of property in general which may have been assigned by an infant under or pursuant to a contract there seems to be no reason why

(n) (1889), 24 Q. B. D. 166.

(o) As to *restitutio in integrum* see pp. 263 *et seq.*, *ante*

(p) [1929] 2 K. B. 310.

he should not have the benefit of the equitable principles as to tracing (q) if, had the property been money, he could have maintained an action for money had and received. In *Pearce v. Brain* (r) Swift, J., appeared to think that the infant's right to specific restitution did not extend beyond this. "I cannot distinguish", he said, "between the recovery of a specific chattel under a void contract and the recovery of money. If the latter cannot be recovered neither can the former." Nevertheless it is not easy to see why the infant's right to restitution should be limited by any other principle than that as a condition of receiving it he should himself make *restitutio in integrum*.

(iii) *Other Party's Right to Restitution*. Where a party elects to avoid liability under a contract on the ground that when he entered into it he was an infant, the other party, if he has already paid money under the contract, may not, at common law, recover it back in an action for money had and received (s).

If, however, an infant party who has elected to avoid the contract still retains property which has passed to him under or pursuant to the contract, may not the other party recover this at common law? There is some authority for the view that he can. In *Stocks v. Wilson* (t) Lush, J., remarked that "at common law an infant who when of full age avoided the contract would have divested himself of the property. . . ." And in *North Western Ry. v. M'Michael* (u) the Court of Exchequer said of a lease to an infant that "as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority". If these *dicta* may be relied upon it is clear that they must be qualified at least to the extent that the party seeking restitution against one who has avoided a contract for infancy must himself be prepared to give *restitutio in integrum*, and that the property sought to be recovered must not be such as may be dealt with at law only by some formal instrument. And, if it be the law that an infant can obtain specific restitution only where

(q) See *Sinclair v. Brougham*, [1914] A. C. 398, and Lord Wright's Essay thereon in 6 Camb. L. J. 305, reprinted in *Legal Essays and Addresses*, p. 1.

(r) [1929] 2 K. B. 310, 315.

(s) *Cowern v. Nield*, [1912] 2 K. B. 419.

(t) [1913] 2 K. B. 235, 246.

(u) (1850), 5 Ex. 114, 127; 155 E. R. 49, 55.

there has been a total failure of consideration even this would no seem a sufficient qualification, for it would be somewhat surprising if the other party to the contract were placed in a better position in this regard than the infant. If the infant's right to specific restitution is in fact thus limited, then, presumably, the other party' is equally limited.

Whatever the position in this matter may be simply at common law, however, it seems that where the case comes under section of the Infants Relief Act, 1874, specific recovery on common law principles may not be had. "I thought at the time [of the argument] that . . . it might be contended that the whole transaction was avoided by the Act and that the property had not passed at all. I am satisfied that that view is wrong and that the property passed by the delivery, notwithstanding the fraud, and that the plaintiff has a remedy in equity or none at all" (x).

Then what right of specific restitution has the other party in equity? Where the infant by his explicit misrepresentation that he is of age fraudulently deceives (y) the other party, that party is entitled to avail himself of the equitable principles as to tracing himself making *restitutio in integrum* (z). Where the infant has made no such fraudulent misrepresentation, however, but still has property which he obtained under the contract from the other party, it may equally be thought that he should not be allowed to retain that property without paying for it. It is true that in *R. Leslie v. Sheill* the importance of a fraudulent misrepresentation was stressed, but there, while there was a fraudulent misrepresentation the infant no longer had in his possession the money advanced by the plaintiff. That case, therefore, is scarcely conclusive of the position where, while the infant has made no fraudulent misrepresentation, he still retains property derived under the contract from the other party. On the other hand, that in such cases restitution may be had against the infant is supported by the old case of *Clarke v. Copley* (a). There a woman at the time of her marriage to the defendant was indebted to the plaintiff on two promissory notes. After the marriage the defendant gave his bond for the amount of the notes which the plaintiff then delivered to the defendant. The plaintiff having sued on the bond the defendant pleaded infancy. Thereupon the plaintiff commenced a suit in

(x) Lush, J., in *Stocks v. Wilson*, [1913] 2 K. B. 235, 246.

(y) *Nelson v. Stocker* (1859), 4 De G. & J. 458, 465; 45 E. R. 178, 181.

(z) *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607.

(a) (1789), 2 Cox 173; 30 E. R. 80.

Chancery and obtained from Sir R. P. Arden, M.R., a decree ordering the defendant to return the notes and not to plead to any action which the plaintiff might bring on them any defence that he could not have pleaded at the time the bond was given. There is nothing in the report to suggest that the decree was based on the defendant's having fraudulently misrepresented his age. It is true that the ground of the decree is said to have been that "an infant shall not take advantage of his own fraud", but fraud as used by equity Judges is not by any means restricted to fraudulent misrepresentation, but includes any conduct of an unfair or unconscionable nature (b). It can hardly be denied that ordinarily one seeking to retain property obtained under a contract while pleading infancy to a claim for the price is acting dishonestly and unconscionably (c). For the law to compel such a person to make restitution (the other party, if he has received anything under the contract, making full restitution on his part) in no way detracts from the principle that in general an infant should be allowed to avoid his contractual obligations. It simply compels the infant to be honest.

(IV) Infant's Liability for Torts Connected with His Contracts.

An infant is in general liable for his torts (d); and it appears to be the law that he is none the less liable in tort because the same act is also a breach of contract. Thus in *Burnard v. Haggis* (e), the defendant, a young man under twenty-one, hired a mare for riding, and, in breach of his contract, used her for jumping and so injured her. The Court of Common Pleas held that the defendant was liable in tort, whether or not he was also liable in contract. A like decision was given by a Divisional Court in *Walley v. Holt* (f), in which case an infant who had hired a horse injured it by over-driving.

Whether *Burnard v. Haggis* and *Walley v. Holt* can be reconciled with the early case of *Jennings v. Rundall* (g) is doubtful. In that case the defendant hired a horse and injured it by driving it

(b) See, e.g., *Nocton v. Ashburton*, [1914] A. C. 932, 953; and *The Earl of Aylesford v. Morris* (1873), L. R. 8 Ch. 484, 490.

(c) The conduct of such a person is very like that of one who, having obtained a contract by innocent misrepresentation, now, with knowledge of the falsity of his statements, insists on keeping that contract. Of such a case Jessel, M.R., in *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 12, said: "Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency . . ."

(d) Salmond, *Torts* (10th ed.), p. 60.

(e) (1863), 14 C. B. (N.S.) 45; 143 E. R. 360.

(f) (1876), 35 L. T. 631.

(g) (1799), 8 T. R. 335; 101 E. R. 1419.

too far. The Court of King's Bench held that he was not liable in tort because the contract of bailment was not binding on him. Some writers attempt to reconcile the cases by distinguishing between torts which are independent of the contract except that there would have been no opportunity of committing them but for the contract and torts which are merely wrongful ways of performing the contract (*h*). Of this Sir John Salmond wrote (*i*): "This distinction . . . seems merely a verbal one, having no logical basis or substance in it." Despite the learned opinions in favour of the supposed distinction, it may well be thought that there is much force in Sir John Salmond's comment. In Sir John Salmond's view *Jennings v. Rundall* was wrongly decided. "It is submitted", he wrote (*k*), "that *Jennings v. Rundall* is a mistaken application of a correct principle—namely, that if the act of a minor is in reality merely a breach of contract, he cannot be made liable by being sued in tort instead. In the old days of forms of action and of legal fictions this was a principle very necessary to be insisted on; for in those days the tort sued on in a delictal action was often a mere fiction, the real cause of action being a breach of contract and nothing more. Thus a breach of warranty on a sale of goods was commonly sued on in tort instead of contract—*case* instead of *assumpsit*. It was in reference to these quasi-torts or fictitious torts that the Courts laid down the rule that an infant or married woman could not be sued in tort unless also liable in contract."

Although an infant is in general liable for his torts he is not liable in tort for procuring a contract by a fraudulent representation whether as to his age or otherwise (*l*). Moreover a representation that he is of full age will not estop him from subsequently setting up his infancy as a defence (*m*).

An infant who receives a chattel under a contract of bailment and refuses to return it after the bailment expires is, in accordance with the general principle, liable for conversion (*n*); but if he receives the chattel under a contract of sale and purchase, the property will pass to him at law even though the contract is void,

(*h*) Anson, Contracts (18th ed.), 133-4, Pollock, Contracts (11th ed.), 64. Pollock's statement was approved by Kennedy, L.J., in *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607, 620, and Atkin, J., in *Fawcett v. Smethurst* (1915), 85 L. J. K. B. 473.

(*i*) Torts (6th ed.), p. 71, n. (o), (10th ed.), p. 61, n. (q).

(*k*) *Ib.*

(*l*) *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607

(*m*) *Levene v. Brougham* (1909), 25 T. L. R. 265

(*n*) *R. v. McDonald* (1885), 15 Q. B. D. 323; *Ballett v. Mingay*, [1943] K. B. 281.

and in such a case, therefore, he is not guilty of conversion if he retains the chattel while refusing to pay the price (o).

§ 112. Lunatics

Lunatics Not so Found by Inquisition. The contract of a lunatic not so found is completely binding on him if his mental condition when he entered into the contract was not such that he was incapable of understanding and acting in the ordinary affairs of life (p); or was abnormal only to the extent that he suffered from delusions which did not concern the subject-matter of the contract (q). Even if the lunatic's mind were unsound to a greater degree than this, however, the contract will nevertheless completely bind him, unless he can prove that his lunacy was known to the other party at the time when the contract was entered into (r), or that the contract was unfair (s). In that case, if the contract has not been executed by the other party, the lunatic may avoid it. If, however, the contract has been wholly or partly executed by the other party then (at any rate where the contract is not shown to be unfair (t)) it would appear necessary that the lunatic, as a condition of avoiding the contract, should make *restitutio in integrum* (u). Presumably one who avoids a contract on account of his lunacy when entering into it is entitled to *restitutio in integrum* (x) from the other party.

Where necessities are provided for a lunatic by or at the expense of a person who knows of the lunacy and does not intend his provision to be by way of gift, the lunatic, while he may be able to avoid any express contract to pay or reimburse that person, will nevertheless be quasi-contractually liable to pay a reasonable sum in respect of those necessities (y). The costs of an application for a commission in lunacy have been held to have been incurred in respect of necessities, and this even where the alleged lunatic was

(o) *Stocks v. Wilson*, [1913] 2 K. B. 235, 246

(p) *Ball v. Mannin* (1829), 3 Bl. (n.s.) 1; 4 E. R. 1211.

(q) *Jenkins v. Morris* (1880), 14 Ch. D. 674; *Birkm v. Wing* (1890), 63 L. T. 80

(r) *Imperial Loan Co v. Stone*, [1892] 1 Q. B. 599, *York Glass Co, Ltd v. Jubb* (1925), 42 T. L. R. 1.

(s) *Molton v. Camroux* (1849), 4 Ex. 17, 19; 154 E. R. 1107, 1108; *Niell v. Morley* (1804), 9 Ves. 478; 32 E. R. 687; *Imperial Loan Co v. Stone*, *supra*, per Lopes, L.J., 603; *York Glass Co., Ltd. v. Jubb*, *supra*. Cf. *Elliott v. Ince* (1857), 7 De G. M. & G. 475; 44 E. R. 186, and *Manning v. Gill* (1872), L. R. 13 Eq. 485, where the voluntary dispositions of lunatics were held to be void. Presumably a voluntary covenant would be in the same case.

(t) Consider *Campbell v. Hooper* (1855), 3 Sm. & G. 153; 65 E. R. 603.

(u) *Molton v. Camroux* and *Niell v. Morley*, *cit. supra*.

(x) As to *restitutio in integrum* see pp. 263 *et seq.*, *ante*.

(y) *Re Rhodes* (1890), 44 Ch. D. 94.

found to be sane (z). In respect of the sale and purchase of necessary goods the law is now declared by section 2 of the Sale of Goods Act, 1893, already quoted (a).

One who lends money which is actually spent in the purchase of necessities for a lunatic is entitled to stand in the position of the suppliers of the necessities and to recover against the lunatic to the extent that they could have done (b).

A lunatic not so found is capable of contracting and performing other legal acts during a lucid interval (c). Accordingly if such a lunatic during a lucid interval ratifies a contract entered into while he was insane he will lose his right of avoidance and thenceforth be fully bound (d).

Lunatics so Found by Inquisition. It was held by the Court of Appeal in *Re Walker* (e) that a person who has been found a lunatic by inquisition which has not since been superseded cannot, even during a lucid interval, execute a valid deed dealing with his property. The ground of the Court's decision was that to allow the lunatic to deal with his property would be inconsistent with the Crown's powers of management of that property as existing at common law and now declared in section 120 of the Lunacy Act, 1890. Whether the principle of this decision extends to the contracts of a lunatic so found is not clear.

§ 113. Drunken Persons

The contract of a person who was so drunk when he entered into it as to be incapable of knowing what he was about or forming any rational judgment in the matter seems to be subject to substantially the same rules as the contract of a lunatic not so found (f). Accordingly his contract will bind him if it is fair and the other party did not know of his condition. Otherwise it will be voidable at his option (g). He may be liable quasi-contractually for necessities; his quasi-contractual liability for necessary goods is now dealt with in section 2 of the Sale of Goods Act, 1893 (h).

(z) *Re Cathcart*, [1893] 1 Ch. 466; *Nelson v. Duncombe* (1846), 9 Beav. 211; 50 E. R. 323.

(a) See p. 308, *ante*.

(b) *Re Beavan*, [1912] 1 Ch. 196.

(c) *Beverley's Case* (1603), 4 Co. Rep. 123 b; 76 E. R. 1118; *Hall v. Warren* (1804), 9 Ves. 605; 32 E. R. 738.

(d) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132.

(e) [1905] 1 Ch. 160.

(f) See *Molton v. Camroux* (1849), 4 Ex. 17; 154 E. R. 1107.

(g) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132.

(h) See p. 308, *ante*.

§ 114. Married Women

By recent statute (i) married women have now the same contractual capacity as though they were unmarried. Thus the common law on this matter has at last been completely overthrown. By the common law a married woman was in general incapable of binding herself by contract. This incapacity was closely connected with the proprietary disabilities which the common law imposed upon her (k). Her proprietary position under the common law may be stated with sufficient accuracy for the present purpose by saying that all property which at law was vested in her at the time of the marriage or would thereafter have vested in her but for the marriage went to her husband absolutely if it were personalty and for an estate for their joint lives and possibly for a further estate by curtesy during his life if it were realty (l). Not until an appreciable improvement was effected in the married woman's proprietary position did she acquire a measure of contractual capacity.

The first advance in these matters was made in equity. At first Courts of Equity followed the principles of the common law not only in regard to legal property but also in regard to purely equitable interests. After a time, however, equity recognised the validity of a trust for the sole and separate benefit of a married woman and enforced it in accordance with its tenor; and out of this beginning developed the equitable doctrine of the married woman's separate estate. Then, having created for the married woman a separate estate, equity proceeded to endow her with a capacity to deal with that estate and to enter into contracts or "engagements" binding it. Nevertheless the separate estate remained in essence merely a trust, and equity would not allow a married woman to charge her separate estate with her engagements if this were forbidden by the terms of the trust by which the separate estate was constituted. In such a case her interest was said to be subject to a restraint upon anticipation (m).

At this point the Legislature intervened with the series of Married Women's Property Acts (n). By the Act of 1882 (o) a

(i) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1

(k) Holdsworth, *History of English Law* (3rd ed.), vol. 3, 528, *Cahill v. Cahill* (1883), 8 App. Cas. 420, 425 ff.

(l) Williams, *Real Property* (24th ed.), 366 ff.; Halsbury, *Laws of England* (2nd ed.), vol. 16, pp. 613 ff.

(m) Generally see Pollock, *Contracts* (11th ed.), 551, note on "History of the Equitable Doctrine of Separate Estate": Williams, *Real Property* (24th ed.), 378 ff.; *Cahill v. Cahill*, *ubi supra*.

(n) 1870, 1882, 1884, 1893 and 1907.

(o) S. 1.

married woman was rendered "capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee"; and she was further declared to be "capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued . . . in contract . . . in all respects as if she were a feme sole . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise". The Act of 1893 (p) provided that "Every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract. . . ." The scheme of this legislation was to develop and extend the principles by which equity had given the married woman a proprietary and contractual capacity. The advantages which hitherto had been obtained in equity by means of intricate settlements were now to accrue automatically both in equity and at law without the necessity for special action to secure them. A new statutory separate estate, which might include both legal and equitable property, was created, and this the married woman was enabled to bind by her contracts which thenceforth were to be recognised at law. But in virtue of the statutes the married woman could no more bind herself personally by her contracts than she could formerly have done in equity (q).

The doctrine of the restraint upon anticipation was expressly preserved under these Acts (r). But as such a restraint was merely a term in an express trust, it could have no application to the new separate estate, which arose not by way of trust but by direct conveyance, assignment, or grant to the married woman "without the intervention of any trustee" (s).

The final stage in the development of the married woman's contractual capacity was accomplished by the enactment of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, to which reference has already been made. Section 1 of this Act declares that "a married woman shall

(p) S. 1.

(q) *Scott v. Morley* (1887). 20 Q. B. D. 120.

(r) S. 19 of the Act of 1882, and s. 1 of the Act of 1893

(s) See *Stogdon v. Lee*, [1891] 1 Q. B. 661, 670.

- (a) be capable of acquiring, holding, and disposing of, any property; and
 - (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation; and
 - (c) be capable of suing and being sued, either in tort or in contract or otherwise; and
 - (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders,
- in all respects as if she were a feme sole". The main practical change introduced by these provisions in respect of the married woman's contractual capacity appears to be that she is now able and will be taken (unless the contrary be expressly stated) to bind herself personally by her contracts and not merely her property.

It remains to notice that under another provision (t) of the new legislation the married woman's restraint upon anticipation is (except in some few cases) abolished in respect of instruments executed on or after January 1, 1936, and any such instrument in so far as it purports to impose such a restraint is declared to be void.

§ 115. Aliens

In time of peace the contractual capacity of an alien differs but little from that of a British subject. At common law a restriction on an alien's contractual capacity arose indirectly through his incapacity to own land (u). Now, however, the British Nationality and Status of Aliens Act, 1914, s. 17, provides that "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject. . . . Provided that this section shall not operate so as to—(1) confer any right on an alien to hold real property situate out of the United Kingdom; or . . . (3) qualify an alien to be the owner of a British ship . . ." (x). It is only to the extent that the exceptions indicated in these provisos to the general operation of the section may indirectly involve contractual incapacities that an alien in peace-time has a more restricted contractual capacity than a British subject.

In time of war aliens who are enemy subjects but resident in this country with the express or implied permission of the Crown suffer at common law no diminution of their contractual

(t) S. 2.

(u) See Halsbury, *Laws of England* (2nd ed.), vol. 1, p. 450, n. (c).

(x) As to the persons, principally aliens, disqualified from owning a British ship, see s. 1, *Merchant Shipping Act*, 1894.

capacity (y). A resident of enemy nationality who has registered as such or otherwise complied with the legal requirements in respect of resident enemy aliens is to be regarded as residing by the implied permission of the Crown (z); and merely that such an alien has been interned does not alter his position in this respect (a). It would seem also that enemy subjects residing and carrying on business in foreign neutral countries are not at common law under any contractual incapacity (b).

At common law contracts which during war (c) are entered into between British subjects and enemy aliens other than those mentioned in the last preceding paragraph are void (d); but this is because such contracts are illegal rather than because of any incapacity in the parties (e). For the present purpose a British subject or the subject of a neutral state who is voluntarily resident or carrying on business in enemy territory is to be regarded as an alien enemy resident in enemy territory (f) (g).

§ 116. Foreign States and Ambassadors

Foreign states and the heads thereof are not, according to English law, incapable of contracting, but they cannot be subjected against their will to the jurisdiction of the English Courts. They may therefore sue in English Courts on their contracts to the same extent as aliens generally, and if they do, a cross-action or counter-claim may be maintained against them in respect of matters immediately arising out of the claim (h). Apart from this,

(y) *Schaffenus v. Goldberg*, [1916] 1 K. B. 284

(z) *Porter v. Freudenberg*, [1915] 1 K. B. 857, 874

(a) *Schaffenus v. Goldberg*, *supra*.

(b) *Re Mary, Duchess of Sutherland, Bechoff, David & Co. v. Bubna* (1915), 31 T. L. R. 248 (Warrington, J.); 394 (C. A.); *Schaffenus v. Goldberg*, *supra*, p. 291.

(c) *The Glenearn*, [1941] P. 51, 61

(d) *Willison v. Patteson* (1817), 7 Taunt. 439, 450; 129 E. R. 176, 180.

(e) *Potts v. Bell* (1800), 8 T. R. 548; 101 E. R. 1540.

(f) *Porter v. Freudenberg*, [1915] 1 K. B. 857, 869. As to the position of a friendly alien whose country has been occupied by the enemy and who still continues to reside and trade there see *Sovfracht (V/O) v. Van Udens, etc.*, [1943] A. C. 203.

(g) The illegality of contracts entered into with enemy aliens is merely one aspect of the larger topic of the legal effect of war on contracts. Other aspects of this topic are noticed in Chapters XIV and XXI, *passim*. On many points the common law rules as to the contracts of alien enemies have been supplemented by the Trading with the Enemy Acts and regulations made thereunder. The general topic is expounded, and in particular the developments which occurred during the Great War are assessed and systematised, in McNair, *Legal Effects of War* (2nd ed.), and Webber, *Effect of War on Contracts*.

(h) *South African Republic v. Compagnie Franco-Belge*, [1898] 1 Ch. 190; *Soviet Republics Union v. Belarew* (1925), 134 L. T. 64.

however, they may, if sued in an English Court, refuse to submit to the Court's jurisdiction (i).

Ambassadors and other public ministers exercising diplomatic functions and accredited to the King of England, together with their families and suites (including domestic servants), are for the present purpose in much the same position as foreign states and the heads thereof and are entitled to claim immunity from the jurisdiction of the English Courts (k). This privilege is not, however, the personal privilege of the ambassador or other person coming within its scope, but is the privilege of his sovereign or government. It can be waived, therefore, only at the direction or with the consent of that sovereign or government, or in the case of persons other than the head of the legation, at the direction or with the consent of the head of the legation (l). For the same reason, once such a direction or consent has been given, the person who might otherwise have been protected by the privilege will, whether he himself wishes it or not, lose that protection, and become subject to the jurisdiction of the Courts in the ordinary way (m). In any case the privilege merely suspends rights of action. After (n) the ambassador or other person is recalled or ceases to hold the office or position which attracted the privilege he may be sued even for a cause of action arising during his period of service; and in such a case the Limitation Act, 1939, does not begin to run in his favour until the time when his diplomatic immunity thus terminates (o).

Consuls, merely as such, are not entitled to diplomatic privilege (p); but a consular officer who is a member of an ambassador's staff will be within the scope of the privilege (q).

(i) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797.

(k) 7 Anne, c. 12 (Diplomatic Privileges Act, 1708), declaring the "ancient doctrine of the common law" (Lord Buckmaster in *Engelke v. Musmann*, [1928] A. C. 433, 440), which, however, so far as it extends beyond the provisions of the Act, still continues to be in force: *The Amazone*, [1940] P. 40.

(l) *Engelke v. Musmann*, *supra*, p. 450; *Re Suarez*, [1918] 1 Ch. 176, 192-4.

(m) *Re Suarez*, [1918] 1 Ch. 176, 192-4; *Dickinson v. Del Solar*, [1930] 1 K. B. 376.

(n) Not necessarily immediately after the presentation of an ambassador's or minister's letters of recall, for the privilege in a proper case will extend for such a period thereafter as is reasonably necessary for him to wind up his official business and prepare for his return home. *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

(o) *Musurus Bey v. Gadban*, *supra*; *Re Suarez*, *supra*.

(p) *Viveash v. Becker* (1814), 3 M. & S. 284; 105 E. R. 619.

(q) *Engelke v. Musmann*, *supra*.

§ 117. Corporations

Definition. A corporation is an artificial person created by the law. "Persons", says Coke (r), "are of two sorts, persons natural created of God . . . and persons incorporate or politique created by the policy of man . . ." A corporation has no physical existence but subsists only in contemplation of law. Its personality is distinct and separate from the personality or personalities of its member or members (s). In some cases, indeed, it would seem that a corporation may survive the last of its members (t).

Corporations have been classified as corporations aggregate and corporations sole. "A corporation aggregate is an incorporated group of co-existing persons, and a corporation sole is an incorporated series of successive persons. The former is that which has several members at a time, while the latter has only one member at a time. . . . Corporations sole are found only when the successive holders of some public office are incorporated so as to constitute a single, permanent and legal person" (u). The common law has little of a special kind to say as to the contracts of a corporation sole. In general neither the benefit nor the burden of such contracts passes at common law to corporator's official successors (x); while at common law the benefit, on the corporator's death, passes to his personal representatives (y). It has been suggested (z), however, that the effect of a provision in the Law of Property Act, 1925, is to reverse these rules so far as the benefit of such contracts is concerned, so that now the benefit of a contract made with a corporation sole will pass to the official successor (a). The Legislature may, of course, provide specially as to the

(r) Co Litt. 2 a

(s) *Salomon v. Salomon*, [1897] A C. 22. "No one can question that a corporation is a legal person distinct from its corporators", said Lord Parker of Waddington in *Daimler Co., Ltd. v. Continental Tyre Co., Ltd.*, [1916] 2 A. C. 307, 338. Nevertheless, as this case shows, this principle will not always be followed to the limits of its logic

(t) Salmond, *Jurisprudence* (7th ed.), 340

(u) Salmond, *Jurisprudence* (7th ed.), 339. For examples of corporation sole, see Halsbury's *Laws of England* (2nd ed.), vol. 8, pp. 8-9, as to the history and nature of the corporation sole see Maitland's *Essays*, *The Corporation Sole*, 16 L. Q. R. 335, and *The Crown as Corporation*, 17 L. Q. R. 131, reprinted in *Collected Papers*, vol. 3, pp. 210, 244.

(x) Pollock, *Contracts* (11th ed.), 95

(y) *Ib.*; Halsbury, *op. cit.*, vol. 8, pp. 97-98.

(z) Halsbury, *op. cit.*, vol. 8, p. 98.

(a) Ss. 180 (1) and 205 (1) (xx). It is also provided by the same Act (s. 180 (3)) that a contract expressed or purporting to be made with a corporation sole while the office is vacant shall, on the filing of the vacancy, be deemed to take effect as if the vacancy had been filled before the contract was made, and the successor may accept or disclaim the contract.

contractual capacity and devolution of the contracts of any particular corporation sole, and sometimes such provisions are to be found in enactments whereby particular corporations sole are created (b).

As compared with corporations aggregate, corporations sole are few and unimportant, and the remainder of this section will be concerned with corporations aggregate only.

Capacity. It is possible to deduce from the juristic nature of a corporation that its legal capacity should be less extensive than that of an ordinary natural person? To some extent, yes. As a corporation has no physical existence it cannot do anything that can only be done by a living man in his own person. For example it cannot contract a marriage, or be a member of the Crown's armed forces, or a member of Parliament (c). But it does not appear that there is anything in the conception of corporate personality logically necessitating any purely legal limitations of capacity as distinct from limitations based on the corporation having no physical existence (d); and at common law a corporation not expressly or impliedly subjected to any limitation of capacity by the terms of its incorporation has, so far as its non-physical nature will allow, the same capacity as a natural person (e).

Limitation of Capacity. Then is it possible for the capacity of a corporation to be expressly or impliedly limited on its creation? In so far as the corporation was created by charter of the Crown solely in virtue of the prerogative a difficulty that seems to have been felt was that any provision in the charter purporting to impose such a limitation would be ineffective in law by reason of the principle that the Crown cannot by its charter change the common law or alter the rights and duties of private persons (g). Certainly there are numerous *dicta* commencing with Coke and extending to modern times which combine in declaring that the Crown cannot by its charter limit the legal capacity of a corporation. If, indeed, a corporation created by the Crown in virtue of the prerogative were forbidden by its charter to do certain things and nevertheless did

(b) See *c.g.*, the Treasury Solicitor Act, 1876. s. 1.

(c) See *Case of Sutton's Hospital* (1613), 10 Co. Rep. 23 a, 32 b; 77 E. R. 960, 973; Blackstone, Commentaries, vol. 1, 464-5; Pollock, Contracts (11th ed.), 96 ff.

(d) Pollock, 27 L. Q. R. at p. 222.

(e) See p. 330, *post*.

(g) Holdsworth, History of English Law (3rd ed.), vol. 3, 48, 49, 55.

them, this would be a ground upon which proceedings might be instituted by the Attorney-General to repeal the charter; but in the meanwhile the acts of the corporation, although contravening the charter, would be fully valid. "This [*Sutton's Hospital Case (h)*] seems to me", said Blackburn, J. (i), "an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case. If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fd.* in the name of the Crown to repeal the letters patent creating the corporation: see *Eastern Archipelago Co. v. R. (k)*. But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation. I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has" (l).

If, however, it is not possible for the Crown by its charter to limit the capacity of a corporation, such a limitation may certainly be imposed by statute. Whether in any particular case a corpora-

(h) *Supra*.

(i) Delivering the judgment of himself, Brett and Grove, J.J., in *Riche v. Ashbury Railway Carriage and Iron Co* (1874), L. R. 9 Ex. 224, 263; their judgment so far as it concerned a statutory corporation was overruled by the House of Lords (L. R. 7 H. L. 653), but this *dictum* was not affected. See also *per* Bowen, L.J., in *Wenlock v. River Dee Co.* (1883), 36 Ch. D. 675, 685 (n.) (affirmed 10 App. Cas. 355).

(k) (1853), 2 E. & B. 856.

(l) See also *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354 (affirmed on different grounds [1910] 2 Ch. 518), where many of the authorities are collected; *Bonanza Creek Gold Mining Co., Ltd. v. R.*, [1916] 1 A. C. 566. The view that the Crown cannot by its charter creating a corporation effectively limit the capacity of its creature has not passed without criticism: see P. T. Carden in 26 L. Q. R. 320, and Holdsworth, *History of English Law* (3rd ed.), vol. 9, pp. 57-62. In *Jenkin v. Pharmaceutical Society*, [1921] 1 Ch. 392, Peterson, J., held that a member of a corporation created by charter may obtain an injunction to restrain the commission by the corporation of acts which are outside the scope of the charter. It does not appear, however, that the principle of this decision would apply to invalidate or affect a contract already entered into by the corporation.

tion is subject to a statutory limitation of capacity is simply a question of statutory interpretation, and this is so whether the corporation has been directly created by Act of Parliament, or has come into existence by complying with conditions upon which an Act offers incorporation (as in the case of companies under the Companies Act, 1929), or is incorporated by royal charter issued pursuant to or confirmed by Act of Parliament. The matter is nowhere better expressed than in the words of Lord Haldane, delivering the judgment of the Privy Council in *Bonanza Creek Gold Mining Co., Ltd. v. R.* (m): "Their Lordships take the view that this principle [whereby the powers of a corporation may be restricted by statute] amounts to no more than that the words employed [in the statute] to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine simply means that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. . . . Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter . . . has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal person-

(m) [1916] 1 A. C. 566, 577.

ality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter" (n).

Ultra Vires. Where the capacity of a corporation is subject to any legal limitation, any act which the corporation purports to do outside the authorised limits is said to be *ultra vires* the corporation.

An *ultra vires* contract is void. Nevertheless one who has partly performed such a contract with a corporation is not in all cases without a remedy. Sometimes he may recover by way of debt. This he may do at common law where he has paid money to the corporation pursuant to a contract *ultra vires* for some reason other than its involving such a payment, and the consideration for that payment can be said to have wholly failed (o). His action in such a case takes the form of a quasi-contractual claim for money had and received. Should the actual receipt of the money be *ultra vires*, however, as in the case of an *ultra vires* loan, the position is different. In such a case the prohibition which renders the express contract void equally requires that a recovery in quasi-contract shall be denied (p). Nevertheless if the person making an *ultra vires* payment to the corporation can show that any part of his money has been applied in discharging the legitimate indebtedness of the corporation he may to that extent recover in equity. He is subrogated, as it is said, to the creditors whose debts have been paid with his money (q). Again, if goods have been delivered or services rendered to and accepted by a corporation under a contract which is *intra vires* with respect to the acceptance of those goods or services but *ultra vires* in some other particular (as, e.g., in respect of the consideration to be given by the corporation), there seems no reason to doubt that the supplier of the goods or services will be entitled quasi-contractually to a reasonable recompense—*quantum valebat* or *quantum meruit* (r).

(n) See also *Wenlock v. River Dee Co* (1883), 36 Ch. D. 675 (n.), *per* Bowen, L J, 685; in H. L. 10 App. Cas. 354.

(o) *Scott's Case* (1882-4), 23 Ch. D. 453; 9 App. Cas. 523, as explained by Lord Parker in *Sinclair v. Brougham*, [1914] A. C. 398, 449-451; see also Lord Parker's judgment at p. 440; and *per* Viscount Haldane, L.C., pp. 414-415, 417-8.

(p) *Sinclair v. Brought*, *cit. supra*, at pp. 414, 440, 452-3.

(q) *S. C.*, 440-1

(r) *Cf. Craven-Ellis v. Canons, Ltd.*, [1936] 2 K. B. 403.

In other cases one who has partly performed an *ultra vires* contract with a corporation may be entitled to relief on the ground that money or property apparently transferred by him to the corporation has not ceased to belong to him in equity or in some cases even at law. And this principle extends to cases where the original money or property has been disposed of by the corporation and replaced with some other asset (s). To recover on this principle the claimant must be able to identify his money or property or the asset representing it in the possession of the corporation (t). It may be, however, that he cannot do this but can nevertheless show that the present extent of the corporation's funds is due in part to the money or property coming from him. In this case also he may have a remedy, founded on the principle of unjust enrichment. The corporation is required by equity to recompense the claimant to the extent that he can show in its funds a superfluity derived from his own contribution. Thus in *Sinclair v. Brougham* (u) a building society which had carried on an *ultra vires* banking business was in liquidation (x). After all legitimate creditors, but not the depositors in the banking business, had been paid, a sum remained greatly in excess of the capital contributed by the members but not sufficient to pay them and the depositors in full. The dealings with the depositors' moneys had been so complicated that it was practically impossible for any individual depositor to identify any particular asset as representing his deposit. In these circumstances it was held that depositors and members should have charges on the residuary fund in proportion to their contributions to it. "The position, therefore, comes to this", said Lord Dunedin (y). "The shareholders are entitled to share among them the proper assets of the society. But they are not entitled to be made rich at the expense of the depositors, by swelling the assets of the society by means of the proceeds of moneys which they themselves never contributed. There is a mixed mass of assets as to the precise composition of which as to source it is impossible to

(s) *Taylor v. Plumer* (1815), 3 M. & S. 562; 105 E. R. 721; *Sinclair v. Brougham*, [1914] A. C. 398, 418—422, 441—2.

(t) The doctrine of tracing will even allow property to be followed into the hands of third parties in certain cases. See *Sinclair v. Brougham*, [1914] A. C. 398, 442. This refinement of the matter is not, however, of such importance as to call for elaboration here.

(u) *Cit. supra*.

(x) As to whether the equity recognised in *Sinclair v. Brougham* would be available if the corporation were not in liquidation see Lord Parker's judgment at p. 449.

(y) At p. 437.

pronounce. Had the assets never shrunk there would be enough to pay both in full. But they have shrunk, and someone must bear the loss . . . the only equitable means is to let each party bear the shrinkage proportionately to the amount originally contributed. . . .” (z).

Where an *ultra vires* contract has been partly performed by the corporation and that performance in itself is not *ultra vires* the corporation may claim on a *quantum meruit* or *valebat*, or for money had and received, or for specific restitution of property, according to the circumstances. If the corporation’s performance is in itself *ultra vires* and is capable of being undone presumably the only remedy available to the corporation would be a claim for restitution either *in specie* or by way of an action for money had and received (a). If, however, the performance is not capable of being undone as, e.g., where it takes the form of services rendered, the position may be different. In such a case it may be arguable that the corporation can claim what the other party has promised under the contract, or at any rate sue on a *quantum meruit*. The doctrine of *ultra vires* is intended to protect the property of the corporation, not to inflict losses upon it (b).

If an *ultra vires* contract has been wholly or partly performed on both sides and one party seeks to recover what he has paid or delivered in performance must he (or it), as a condition of any such recovery, restore what he (or it) has received from the other party? In other words, is the making of *restitutio in integrum* (c) by the claimant a condition of his recovery? It appears to be so. Fletcher Moulton, L.J., dealt with the matter in the course of his judgment when *Sinclair v. Brougham* was before the Court of Appeal (d). He said: “If a company had purported to purchase a railway by an *ultra vires* contract and was seeking to recover the money paid as money paid by agents without authority, the Courts would not permit it to recover the money and still keep the railway. The incapacity to purchase would bring with it an incapacity to acquire the property, and therefore the railway would not belong

(z) See further Lord Wright’s article on *Sinclair v. Brougham* in 6 Camb. L. J. 305, now reprinted in *Legal Essays and Addresses*, p. 1.

(a) *Brougham v. Dwyer* (1913), 108 L. T. 504.

(b) Cf. *Fishmongers Co. v. Robertson* (1843), 5 Man & G. 131; 131 E. R. 510, cited p. 143, *ante*.

(c) See pp. 263 *et seq.*, *ante*.

(d) *Sub nom. Re Bulbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183, 223. Fletcher Moulton, L.J.’s judgment was largely approved in the House of Lords: [1914] A. C. 438, 449.

to them. To hold otherwise would be to establish that corporations could not suffer, but might profit by *ultra vires* transactions—a doctrine the effect of which would be most pernicious and which would rest on no sound principle of law or equity” (e).

(e) See also *Re Saxon Life Assurance Society, Era Case* (1862), 2 J. & H. 408; 70 E. R. 1117. In this case the Era Company purchased the business of the Saxon Company. The transaction was held by Page Wood, V.C., to be *ultra vires* both companies. Both companies went into liquidation and Era sought to maintain a proof against Saxon which in effect amounted to a claim to recover what Era had paid out under the transaction. The Vice-Chancellor refused to admit this claim because the parties could not be restored to their original situation. His decision was afterwards affirmed by the Lords Justices, apparently on different grounds: 1 De G. J. & S. 29; 46 E. R. 12. See 32 L. J. Ch. at 212. See further *Re Cork and Youghal Ry.* (1869), L. R. 4 Ch. 748, 762.

CHAPTER XIV

ILLEGAL AND NUGATORY CONTRACTS

§ 118. Illegality in Contract

A contract may be void because it is illegal (a).

In the strict and proper sense of the term, illegality means a breach of the law—a violation of a legal prohibition (b). It need hardly be said that the commission of a crime or a tort is an illegal act in this sense. The common law or the Legislature in declaring that such and such an act is a crime or a tort must necessarily be taken to forbid the commission of that act. But merely that the performance of an act in favour of one person amounts to a breach of a contract antecedently entered into with another person will not of itself render that act illegal (c). Nor, subject to the rule that without just cause or excuse to induce another to break a contract between him and a third party is a tort against that third party (d), does it matter that the person in whose favour the act was performed should have known of the existence of the prior contract. Thus A, although engaged to B, may lawfully marry C, and this even though C knew of the engagement to B. If any man chooses to make two inconsistent contracts with different persons he is bound by both of them, even though it is impossible for him to perform them both. To the extent that he fails to perform each

(a) *Collins v Blanton* (1767), 2 Wils 341, 1 Sm. L. C. (13th ed.), 406.

(b) "There are two senses in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law will not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality. some on the ground that they are contrary to public policy; as, for example, in restraint of trade and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful', which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law*, is not applicable to such contracts". Lord Halsbury, L. C., in *Mogul S S Co. v McGregor Gou & Co.*, [1892] A. C. 25. 39. See also *per Bowen, L. J.*, same case in C. A., 23 Q. B. D. at 619; *Hilton v. Echelsley* (1855), 6 E. & B. 47, 74-75; 119 E. R. 781, 792 (the case in the Exchequer Chamber mentioned by Lord Halsbury); *Haigh v. Town Council of Sheffield* (1874), L. R. 10 Q. B. 102, 109; *Bridger v. Savage* (1885), 15 Q. B. D. 363, 367; and *Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 697, 704-5.

(c) Cf. Smith, *Leading Cases* (13th ed.), vol. 1, 432.

(d) Salmond, *Torts* (10th ed.), 361.

of them he must pay damages. So if a man promises to marry two different women and fails to marry either an action for damages will lie against him at the suit of each of them; and if he marries one, then he may be sued for damages by the other (*e*). A similar position arises where a man agrees to sell his goods first to A, and then to B (*f*).

Doubtless the great majority of illegal acts are either torts or crimes; but an act prohibited by the Legislature without being constituted either a tort or a crime is nevertheless an illegal act in the present sense (*g*). Whether a particular enactment contains such a prohibition is a question of statutory interpretation not always easy of solution (*h*). It is not, however, a matter calling for particular consideration in this place.

Illegality for the purposes of the law of contract, however, comprises not merely cases which are breaches of the law in the sense which has now been explained, but extends also to acts of sexual immorality not involving the commission of a crime or tort, and certain acts which, while not prohibited by law, so offend against public policy (*i*) that the law stigmatises any contract involving them as illegal. Thus it is not illegal for an unmarried woman to live with an unmarried man as his mistress, but a contract that she should do so in consideration of his maintaining her and any children who might be born of the union would be an illegal contract (*k*). Again, it is not contrary to English law for persons in England to export to a friendly foreign country merchandise the importation of which is forbidden by the laws of that country; but a contract made in England relating to such a project would nevertheless be illegal as contrary to English public policy (*l*).

§ 119. How a Contract May be Illegal

The illegality which affects a contract may be either intrinsic or extrinsic to the contract. Illegality is intrinsic when it arises out

(*e*) Cf. *Short v. Stone* (1846), 8 Q. B. (N.S.) 358; 115 E. R. 911; *Gaines v. Smith* (1846), 15 M. & W. 189; 153 E. R. 816.

(*f*) *Ford v. Tiley* (1827), 6 B. & C. 325; 108 E. R. 472; *Bowdell v. Parsons* (1808), 10 East 359; 103 E. R. 811.

(*g*) *Re South Wales Atlantic Steamship Co.* (1875), 2 Ch D. 763; *Shaw v. Benson* (1883), 11 Q. B. D. 563.

(*h*) See the discussions in the judgments in *Anderson, Ltd v. Daniel*, [1924] 1 K. B. 138.

(*i*) As to public policy see Lord Wright's essay in *Legal Essays and Addresses*, 66 ff., and the judgments in *Fender v. St. John-Mildmay*, [1938] A. C. 1, particularly Lord Atkin's at pp. 10 ff., and Lord Wright's at pp. 37 ff.

(*k*) *Lord Bramwell, Mogul S.S. Co., Ltd. v. McGregor, Gow & Co.*, [1892] A. C. 25, 46; *Upfill v. Wright*, [1911] 1 K. B. 506.

(*l*) *Foster v. Driscoll*, [1929] 1 K. B. 470.

of the terms or making of the contract. It is extrinsic where it has its source in some matter other than the terms or the making of the contract, *i.e.*, in some matter extrinsic to the contract.

A contract may be intrinsically illegal in any of the following ways.

In the first place it may be illegal because it contains a promise that an illegal or immoral act will be performed. Thus a contract whereby A for good consideration promises B to libel X is illegal under this head. Another illustration is afforded by the contract (if any) entered into by one who participates in a lottery. A lottery, which is made illegal by statute (*m*), is the distribution of prizes by lot or chance (*n*). It is no essential part of a lottery that there should be a contract between the participants *inter se* or between each participant and the organiser of the lottery (*o*). If there is such a contract, however, it will necessarily contain a promise that an illegal act, *viz.*, the distribution of a prize by chance, shall be performed, and hence will itself be illegal.

In the second place a contract may be affected by intrinsic illegality because it contains a condition the contingency of which is the performance of an illegal or immoral act. An illustration is a contract whereby A promises to pay money to B if B libels X.

In the third place a contract may be intrinsically illegal because of the illegality of the act performed by one party as executed consideration constituting the acceptance of the offer of the other party. This is the case where B libels X by way of acceptance of A's offer of a reward for so doing.

The fourth instance of intrinsic illegality occurs where the making of the contract, as distinct from its terms or any executed consideration involved in it, is a forbidden and illegal thing. Thus, with certain exceptions, it is illegal for more than twenty persons, without registering as a company under the Companies Act, 1929, to associate together for the purpose of carrying on business for gain, not because such a business may be unlawful, but because the very act of unregistered association is forbidden (*p*). So again, with certain exceptions the making of a contract by a person on a Sunday in the way of his trade or business is a prohibited and

(*m*) The Betting and Lotteries Act, 1934, s. 21. Certain lotteries are exempted from condemnation: ss. 23, 24, 25.

(*n*) *Taylor v. Smetten* (1883), 11 Q. B. D. 207.

(*o*) *Wilks v. Young & Stembidge*, [1907] 1 K. B. 448.

(*p*) Companies Act, 1929, ss. 357, 358; *Shaw v. Benson* (1883), 9 Q. B. D. 563.

illegal act (q) even though the contract be wholly executory and performance be intended to take place only on week-days.

Fifthly and lastly, a contract may be intrinsically illegal because its terms, although in themselves innocent, are such as to encourage or induce one or both parties to act illegally or immorally. As an illustration may be taken the case of a promise by one who is already married to marry a third person if and when the existing marriage should be terminated by divorce or by the death of the other spouse. Although, upon the termination of the existing marriage in either of these ways the contemplated new marriage would be quite lawful, such a contract is nevertheless illegal, for it not only offends against public policy as being inconsistent with the existing marital tie (r), but it is conducive to immorality and possibly to crime (s). It has been held in the House of Lords, however, that a promise by a married person in respect of whose marriage a decree *nisi* of divorce has been pronounced to marry a third person after the decree has been made absolute is not open to these objections and is valid (t).

§ 120. Extrinsic Illegality

A contract is extrinsically illegal when it is so related to some external source of illegality as to be rendered illegal thereby. This may happen in a number of ways.

Ulterior Illegal Purpose. Firstly, a contract may be illegal because one or both of the parties has or have entered into the contract for some ulterior purpose of an illegal nature. 'Poison may be purchased for the purpose of committing murder.' A house may be hired for the purpose of using it for prostitution. In such cases the contract, although in itself innocent, will be rendered illegal by the purpose which its making was intended to promote (u). It

(q) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1.

(r) Cf. p. 373, *post*.

(s) *Wilson v. Carnley*, [1908] 1 K. B. 729; cf. *per* Lord Atkin in *Fender v. John-Mildmay*, [1938] A. C. 1, 16.

(t) *Fender v. St. John-Mildmay*, *supra*.

(u) *Gas Light and Coke Co. v. Turner* (1840), 5 Bing. N. C. 666; 6 *ib.* 324; 32 E. R. 1257; 133 *ib.* 127; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213; *Alexander Rayson*, [1936] 1 K. B. 169, 182 ff.; *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763. In the last case solicitors had rendered professional services in the formation of a shipping company which was an illegal association because, consisting of more than twenty persons, it was not registered under the Companies Act, 1862 (see now Companies Act, 1929, s. 357). The Court of Appeal held that in those circumstances the rendering of such services did not give rise to a sufficient debt to enable the solicitors to present a winding-up petition.

does not matter that the illegal purpose may be merely subsidiary or collateral to the main purpose of the contract. It will taint the contract nevertheless. This may be illustrated by the modern case of *Alexander v. Rayson* (x). In that case the lessor of a service flat let at £1,200 a year embodied the contract between him and the lessee in two documents one of which purported to be a lease at a rent of £450 and the other a service agreement at £750. He was alleged to have done this in order to facilitate the perpetration of a fraud on the rating authority; and there was evidence that he had actually attempted to carry out this illegal purpose. The Court of Appeal held that such an illegal purpose, although in a collateral matter only, would be sufficient to vitiate the contract between the parties, and that if the alleged illegality were made out the lessor's claim for arrears due under the two documents must fail.

It seems that a contract which would ordinarily be illegal because it was entered into for some ulterior illegal purpose may nevertheless be saved if the guilty party or parties can be shown to have repented of and abandoned the illegal purpose before entering upon the performance of any part of that purpose (y). The mere entering into the contract and acts of performance in themselves innocent are not to be regarded in the present context as a commencement of the performance of the illegal purpose (z).

Part of Some Larger Illegal Transaction. Secondly, a contract, which regarded in isolation would be legal, may nevertheless be illegal if it is merely a part of some larger transaction of an illegal nature. *Foster v. Driscoll* (a) affords an illustration. In that case there was a complicated agreement between several persons, the object of which was the smuggling of whisky into the United States of America, in violation of the laws of that country. This agreement was illegal as infringing against English public policy. Certain terms of the agreement were reduced to writing. Pursuant to provisions contained in these written terms two bills were drawn and accepted by certain of the parties in favour of another of them and duly delivered to him. The illegal purpose of the transaction as a whole did not appear on the face of any of the documents. An action was commenced by one party claiming rescission of the

(x) [1936] 1 K. B. 169.

(y) *Alexander v. Rayson*, at p. 190. See pp. 349, 350, *post*.

(z) If, however, the contract were entered into in some peculiar way or form, the peculiarity being intended to further the illegal purpose, this special circumstance would convert the act of entering into the contract into a commencement of the performance of the illegal purpose. *Alexander v. Rayson*, *supra*.

(a) [1929] 1 K. B. 470.

written agreement and delivery up of one of the bills; and two other actions were commenced by another of the parties as holder of the bills, against the parties who had made and accepted them. The Court of Appeal dismissed all three actions on the ground that the several contracts were illegal as forming part of a larger transaction of an illegal nature. "In these circumstances," said Lawrence, L.J., "it is not surprising to find that the documents which were in fact drawn up and which have formed the principal topic of discussion in the Court below and in this Court, do not (even when pieced together) disclose the true nature of the adventure, or the whole of the terms arranged between the parties. It is settled law, however, that the existence of illegality may be proved by parol evidence notwithstanding the apparent legality of the documents before the Court: *Collins v. Blantern* (b); and that if it be proved that a partnership was established for an illegal purpose the parties will not be allowed to escape the consequences of such illegality merely because they have taken care to conceal it: see, for example, *Stewart v. Gibson* (c) and *Armstrong v. Armstrong* (d)" (e).

Pursuant to Antecedent Illegal Contract. Thirdly, a contract *eo facie* legal may be illegal if it is intended to work out or give effect to or to protect an interest arising from some antecedent illegal contract or transaction. An important illustration of this head of extrinsic illegality is afforded by the operation on securities for illegal transactions of the illegality primarily attaching to the principal transaction. This topic will be considered at a later stage of our discussion (f). Another illustration is provided by the case of *Cunard v. Hyde* (g). There timber was shipped as deck cargo contrary to the provisions of an Act of Parliament rendering illegal a voyage with a ship so laden. It was known to and intended by those interested in the timber that it should be stowed on deck (h). The timber having been lost those interested in it sought to recover under a policy of insurance. It was held by the Court of Queen's Bench that the illegality of the voyage extended to and vitiated

(b) (1767), 2 Wils. 341; 1 Sm. L. C. (13th ed.), 406.

(c) (1838), 7 Cl. & F. 707; 7 E. R. 1237.

(d) (1834), 3 My. & K. 45; 40 E. R. 18.

(e) See also *Berg v. Sadler and Moore*, [1937] 2 K. B. 158.

(f) See p. 534, *post*.

(g) (1859), 2 E. & E. 1; 121 E. R. 1.

(h) See *Wilson v. Rankin* (1865), L. R. 1 Q. B. 162.

the policy of insurance. As was said by Tindal, C.J., in an earlier case in which a similar question arose (i): "A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced."

It is to be observed that a contract which is not in itself illegal is not necessarily illegal because it deals to some extent with the same subject-matter as a prior illegal contract between the same parties, or contains certain terms having the same content as some of the terms of such a prior illegal contract. If, indeed, the second contract consists of a promise to perform or is a security for the performance of the first or of some obligation arising out of the first (k), or is given by way of satisfaction and discharge of such an obligation (l), or if it consists of a ratification of the first, that is, an acknowledgment that the first is a binding contract, it will clearly be tainted by the illegality of the first. But if it is independent of the first save that to some extent it covers the same ground or contains some of the same terms as the first, and it is not in itself illegal, it will be valid and effective. Thus in *Skipper v. Kelly* (m) the plaintiff, being then a married woman, and the defendant mutually agreed that they would marry when the plaintiff should obtain a divorce. The divorce was subsequently obtained and the defendant then gave the plaintiff an engagement ring and the date for the wedding was arranged. Ultimately the defendant married another woman, and the plaintiff sued for breach of promise of marriage. The Privy Council held that the facts warranted the inference of a new promise to marry, independent of and therefore not tainted by the illegality affecting the earlier promise (n).

§ 121. Illegality May be Initial or Supervening

In considering the effect of illegality on contracts in respect of which it exists a distinction must be drawn between illegality existing at the time when the contract was made and illegality arising subsequently, the contract having been lawful when made. The former may be called initial illegality, the latter supervening

(i) *Redmond v. Smith* (1844), 7 Man. & G. 457, 474; 135 E. R. 183, 190.

(k) *Fisher v. Bridges* (1854), 3 E. & B. 642; 118 E. R. 1283.

(l) *E.g.*, a cheque paid to and accepted by a prostitute in satisfaction of a "debt" owing to her for her illicit services.

(m) (1926), 42 T. L. R. 258.

(n) See also *Fender v. St. John-Mildmay*, [1938] A. C. 1, where the promise to marry upheld in the House of Lords had also been preceded by an earlier illegal promise to marry.

illegality. A contract, for example, is affected and invalidated by initial illegality if it is made with one who at the time of the making of it is an alien enemy, intercourse with the enemy being illegal (o). A similar contract, on the other hand, made at a time of peace, might (p) be affected and invalidated by supervening illegality if war should break out before it had been performed. So a contract for the importation or exportation of merchandise is invalidated by supervening illegality if the importation or exportation of such merchandise is subsequently prohibited by law. The effects of these two kinds of illegality on contracts are in divers respects different and it will be convenient to discuss them separately.

§ 122. Initial Illegality May be Known or Unknown to the Parties

The operation of initial illegality depends in some measure on whether it was, at the time of the making of the contract, known to one or both of the contracting parties. It is quite possible that the illegality affecting the contract may be known to only one of the parties or even to neither of them. As an illustration of initial illegality known to only one of the parties may be taken the case of a man who being already married (a decree *nisi* of divorce not having been pronounced in respect of this marriage (q)) wilfully and fraudulently contracts to marry another woman who believes him to be unmarried (r). For illustration of a contract initially illegal where nevertheless neither party was aware of the illegality we may take the case of a contract entered into to-day between two parties one of whom by reason of a declaration of war made yesterday is an enemy alien, but neither of whom has yet learnt that war has been declared.

When we say that one or both parties may not have known of the illegality we are not speaking of ignorance of law—for all persons are deemed to know the law, and are not at liberty to say that by mistake of law they believed their contract to be permissible (s). It is ignorance of some fact making illegal a contract which was believed to be legal which is relevant in the present connection. Thus where a woman and a man, who to the woman's

(o) *Willison v. Patteson* (1817), 1 Moore C. P. 133; 129 E. R. 176; see also *Robson v. Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124; and *The Glenearn*, [1941] P. 51, 61.

(p) See McNair, *Legal Effects of War* (2nd ed.), 87; *Ottoman Bank v. Jebara*, [1928] A. C. 269.

(q) *Fender v. St. John-Mildmay*, [1938] A. C. 1.

(r) Cf. Phillimore, J., in *Spier v. Hunt*, [1907] 1 K. B. 720, 723.

(s) *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558.

knowledge is already bound by a marriage in respect of which no decree *nisi* of divorce has been pronounced, mutually agree to marry each other as soon as the existing marriage is dissolved by the death of the wife or divorce, it is entirely immaterial that one or both parties should, by reason of ignorance of the law, have mistakenly supposed that the contract was valid (*t*).

§ 123. Operation of Initial Illegality Known to Both Parties

No doubt much the commonest case of initial illegality affecting a contract is that where the illegality is known to both parties; and we shall consider it first. In such cases the parties are *participes criminis*, taking part jointly and wilfully in the making of an illegal contract, and the contract itself is wholly void *ab initio*. "This is a contract", said Wilmot, L.C.J., in the leading case of *Collins v. Blantern* (*u*), "to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice."

§ 124. Restitutio in Integrum where Initial Illegality Known to Both Parties

A contract which is void for initial illegality known to both parties, and therefore not binding on either of them, may nevertheless be in fact performed in whole or in part by one or both of them. The question, therefore, arises as to the rights of the parties in respect of such acts of performance. In an illegal contract for the sale and purchase of goods the seller may deliver the goods. Is the buyer then bound to pay for them? If not, is the seller entitled to get the goods back if the buyer refuses to pay for them on the ground that the contract is void? In other words, what right of *restitutio in integrum* exists as between the parties to an illegal contract? The general answer is that no such right exists (*x*). In this respect a contract void for illegality differs essentially from contracts void on any other ground. In cases other than illegality the law is prepared on certain conditions and with certain limitations to adjust the rights of the parties in respect of acts of performance done in the belief that the contract was binding. But

(*t*) Cf. *Wilson v. Carnley*, [1908] 1 K. B. 729.

(*u*) (1767), 2 Wils. 341, 350; 95 E. R. 847, 852; 1 Sm. L. C. (13th ed.), 406, 410.

(*x*) *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558

not so with illegality. In this case the rights of the parties are governed by a special rule formulated in the maxim *ex turpi causa non oritur actio*. An illegal contract is a *turpis causa* within the meaning of this principle.

Ex turpi causa non oritur actio does not mean merely that a party to an illegal contract cannot bring an action for the enforcement of it, for this is equally true with respect to all contracts which are void for any reason. The maxim embodies a special and more far-reaching principle, applicable exclusively to cases of illegality. It means that no person can claim any right or remedy on the basis that he has been a party to an illegal transaction, whether a contract or otherwise (y). If an illegal contract is an essential constituent of his cause of action he cannot succeed. "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal . . . if the person invoking the aid of the Court is himself implicated in the illegality" (z).

In other words, illegality is a good plea for a defendant, but it is not a permissible allegation for a plaintiff. No plaintiff in formulating a cause of action will be heard to allege that the transaction on which he bases his claim was an illegal transaction to which he himself was a party. He cannot claim any right from his own wrongdoing. But a defendant will be heard to defend himself from a claim made against him by an allegation that the transaction out of which the claim arises was illegal, even though he himself was a party to it. It is for this reason that the maxim as to *turpis causa* is otherwise expressed in the saying, *in pari delicto potior est conditio defendentis* (a).

If, for example, in an illegal contract for the sale of goods the seller were to deliver the goods and sue for the price, the buyer would be entitled to plead that the contract was illegal and void.

(y) Buckley, L.J., in *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K. B. 1080, 1098.

(z) Lindley, L.J., *Scott v. Brown, Doering, McNab & Co*, [1892] 2 Q. B. 724, 728.

(a) Cf. Lord Mansfield, C.J., in *Holman v. Johnson* (1775), 1 Cowp. 341, 343; 98 E. R. 1120, 1121: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. . . . If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or as the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

So if the buyer had paid the price in advance and the seller refused to deliver the goods, the seller would be similarly entitled to the same plea. But if the seller, not being able to get the price, were to sue the buyer for a return of the goods, the buyer could plead that they were delivered to him under a contract of sale; and the only reply of the plaintiff would be that the contract could not be relied on by the buyer because it was illegal and therefore void. But this reply is excluded by the rule in question. The plaintiff will not be permitted to establish his claim by any such replication, for it amounts to a reliance on the illegality of a transaction to which he was a party. On the same principle if the buyer, not being able to get the goods, sued the seller for a return of the price, the seller could effectively plead that it was paid to him under a contract of sale, and the plaintiff buyer would not be permitted to plead that the contract was illegal. It follows, therefore, that the buyer may keep the goods without paying for them, and that the seller may keep the price without delivering the goods (b).

The consequence, therefore, of the maxim *ex turpi causa non oritur actio* is that the right of *restitutio in integrum* is excluded in respect of all acts of performance of a contract void for illegality. This principle, however, is subject to a number of real or apparent exceptions which now require consideration.

§ 125. Exceptions to the Rule Against Restitution

1. Cause of Action Independent of Illegal Contract. In the first place, there is an apparent exception in the case where a party seeking restitution is not bound to rely on the illegality of the contract, but relies instead on his subsisting ownership of the property which is the subject-matter of the contract. If, for example, I lend my horse to a man for a week in order that he may use it in the commission of a highway robbery, and he refuses to return it to me at the end of the week, there is no doubt that I can recover it from him, notwithstanding the illegality of the transaction. For I am not bound to sue on the illegal contract, being entitled, instead of doing so, to rely on my ownership of the horse and to sue in detinue for the tort of wrongfully detaining it. The borrower could not effectually plead in answer to my claim that he obtained the horse in pursuance of a contract, for I could reply that the contract had come to an end by effluxion of time, and I should not be driven to the inadmissible reply that the contract was illegal. Nor could

(b) See *per Fry, L.J.*, in *Kearley v. Thomson* (1890), 24 Q. B. D. 742, 745.

the borrower plead that the contract under which he obtained the horse was illegal, for the action is not based on any contract. He would therefore have no defence at all, and I should recover the horse without having to rely on any participation of mine in an illegal transaction (c). On the same principle he who agreed to let his house to a woman for the purpose of prostitution could, in reliance on the fact that he was the freehold owner of the property, recover it in ejectment at the end of the agreed term (d); though he would be unable to recover the rent, since for this purpose he would have to rely on his illegal contract (e). Such cases are distinct from the illustrations already used of a delivery of goods under an illegal contract of sale. There the property would have passed to the buyer but for the illegality and invalidity of the contract; the unpaid seller, therefore, cannot reply to the buyer's plea of ownership except by a replication that the contract was illegal, and this replication is excluded by the rule of the *turpis causa* (f).

2. Parties Not in Pari Delicto. A second and real exception to the rule that there is no *restitutio* in the case of an illegal contract exists where the contracting parties, though both guilty of taking part in an illegal transaction, are not *in pari delicto* (g). The offence of one of them so far exceeds that of the other as to make

(c) *Simpson v. Bloss* (1816), 7 Taunt. 246, 249—250, 129 E. R. 99, 100; *Fitz v. Nichols* (1846), 2 C. B. 501; 135 E. R. 1042; *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491, 499—500; *Whitmore v. Farley* (1881), 45 L. T. 99; 14 Cox C. C. 617; *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K. B. 1080; *Farmers' Mart, Ltd. v. Milne*, [1915] A. C. 106, 113—114; *Berg v. Sadler and Moore*, [1937] 2 K. B. 158, 163—164.

(d) As to whether one who has illegally leased or hired property for a term can recover it back before the end of the term see *Gas Light and Coke Co. v. Turner* (1840), 5 Bing. N. C. 666; 6 *ib.* 324; 132 E. R. 1257; 133 *ib.* 127; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213, *per* Martin, B. (*arg.*), 217. As to the position in the case of an illegal pledge see *Tregoning v. Attenborough* (1830), 7 Bing. 97, 131 E. R. 37. See also *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300. These authorities all support a right of recovery in the owner of the property. Such a right, however, seems contrary to principle. The lessor, pledgor or lender seeking to recover inconsistently with the terms of the lease, pledge or loan can do so only by setting up the illegality of the transaction. It is not solely upon his ownership that he relies, but upon his ownership coupled with the illegality of the contract which *ex facie* limits it. That is, an essential element in his claim arises *ex turpi causa*. This view of the matter is supported by *Scarfe v. Morgan* (1838), 4 M. & W. 270; 150 E. R. 1430, and *Taylor v. Chester* (1869), L. R. 4 Q. B. 309, and these cases, it is submitted, and not those previously mentioned, represent the law in this matter. See also *Alexander v. Rayson*, [1936] 1 K. B. 169, 185—7.

(e) *Gas Light and Coke Co. v. Turner*, *supra*; *Upfill v. Wright*, [1911] 1 K. B. 506.

(f) *Taylor v. Chester*, *supra*.

(g) *Atkinson v. Denby* (1862), 7 H. & N. 934; 158 E. R. 749

it just and reasonable that the other should be entitled not, indeed, to enforce the contract but to obtain some measure or form of *restitutio in integrum* in respect of acts of performance done by him in favour of the more guilty party. This is so where the illegal contract has been procured by some form of oppression, undue influence, or abuse of a position of influence or power. In *Atkinson v. Denby* (h) the plaintiff, being financially embarrassed, offered his creditors a composition of 5s. in the pound. The defendant, who was one of the creditors, refused to join in the composition unless he received in addition to the 5s. in the pound £50 and a six months' bill for £108. The plaintiff paid the £50 and gave the bill, and the composition was duly carried through. Thereupon the plaintiff sued the defendant to recover back the £50. It was held by the Exchequer Chamber, affirming the Court of Exchequer, that he might do so. "Where one person can dictate", said Cockburn, C.J. (i), "and the other has no alternative but to submit, it is coercion, and, in the language of Lord Ellenborough, 'one holds the rod and the other bows to it' (k). Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit" (l).

On a similar principle recovery is allowed "where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract" (m). One seeking restitution on this principle

(h) (1861), 6 H. & N. 778; 158 E. R. 321; in Exchequer Chamber, 7 H. & N. 934; 158 E. R. 749.

(i) 6 H. & N. 936; 158 E. R. 750.

(k) *Smith v. Cuff* (1817), 6 M. & S. 160; 105 E. R. 1203.

(l) See also *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558.

(m) Lord Mansfield, *Browning v. Morris* (1778), 2 Cowp. 790, 792; 98 E. R. 1364; *Barclay v. Pearson*, [1893] 2 Ch. 154, 166; *Kearley v. Thomson* (1890), 24 Q. B. D. 742, 745.

may be allowed it only on the terms of himself restoring what he has obtained from the other party (n).

3. **Illegal Purpose Unfulfilled.** A third exception arises when the law thinks fit to allow a *locus pœnitentiæ* to one or both of the parties in consideration of the fact that the illegal purpose of the contract has not yet been fulfilled. In such cases it is considered that the ends of justice and public policy will best be served by allowing a party to repent before it is too late, and to prevent the completion of the illegal purpose by reclaiming property delivered or money paid by him in pursuance of the contract (o). In applying this principle to a state of facts in which a number of innocent acts are intended to be done by way of preparation for or as a preliminary to an act of illegality, the innocent acts must not be regarded as infected by the ultimate illegality; for if all that has been done is these preliminary acts which are in themselves innocent, and no part of the essential illegality itself has been entered upon, then the principle of repentance will still be applicable. Thus in *Taylor v. Bowers* (p) the plaintiff, with the purpose of placing certain goods out of reach of his creditors, delivered them to A, who was to keep them while the plaintiff, by fraudulently asserting a lack of the assets which he had thus put out of the way, was to negotiate a composition with the creditors. In fact, however, these negotiations were never entered upon, and the plaintiff sought to recover his goods. It was held by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the plaintiff was entitled to recover. *Taylor v. Bowers* was adversely criticised by Fry, L.J., in *Kearley v. Thomson* (q). "I think," he said, "the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court [Court of Appeal], yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice." In *Hermann v. Charlesworth* (r), however, Collins, M.R., clearly approved of *Taylor v. Bowers*, and distinguished *Kearley v.*

(n) *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300.

(o) *Harry Parker, Ltd. v. Mason*, [1940] 2 K. B. 590.

(p) (1876), 1 Q. B. D. 291. See also the following: *Walker v. Chapman* (1773), Loft. 342; 98 E. R. 684; *Lowry v. Bourdieu* (1780), 2 Doug. 468, 471; 99 E. R. 299, 300, per Buller, J.; *Lacause v. White* (1798), 7 T. R. 535; 101 E. R. 118; *Tappenden v. Randall* (1801), 2 Bos. & P. 467; 126 E. R. 1388; and *Aubert v. Walsh* (1810), 3 Taunt. 277; 128 E. R. 110.

(q) (1890), 24 Q. B. D. 742.

(r) [1905] 2 K. B. 128, 134.

Thomson. "In that case [*Taylor v. Bowers*]," he said, "it was clear that some consideration had passed because in pursuance of the agreement the goods of the debtor had been removed and warehoused; but that was not allowed to interfere with the decision of the Court, for having regard to the main object of the agreement, no part of that had been accomplished." Then, referring to *Kearley v. Thomson*, the Master of the Rolls continued: "How far is that qualified by the decision in *Kearley v. Thomson*, which was also a decision of the Court of Appeal? Fry, L.J., took exception to the statement of Mellish, L.J., in the former case; but it is to be observed that in the later case the illegal purpose, which was to defeat creditors, had been largely accomplished, for the contract was that the defendants should not appear at the public examination of the bankrupt, and that contract to abstain from appearing had been carried out." *Taylor v. Bowers* has been twice cited recently in the Court of Appeal without disapproval (s). On both occasions, however, the Court pointed out that as soon as any part of the illegality itself had been entered upon, no recovery could be allowed; nor would it be "when the repentance . . . is merely due to the frustration by others of the plaintiff's fraudulent purpose" (t). In such a case the plaintiff's repentance, coming only after he has been found out, comes too late.

What is perhaps merely a special application of this principle occurs in regard to agents and trustees. It is clear that the Courts will no more enforce an illegal trust or agency than an illegal contract. If, for example, property is entrusted to an agent or vested in a trustee for the purpose of carrying out an illegal purpose and the agent or trustee carries out that purpose so negligently that a loss ensues, he cannot be charged with the loss for this would be to enforce the illegal agency or trust against him (u). Where, however, the agent or trustee still has in his hands property which was to be applied to the illegal purpose the person providing the property may recover it (or so much of it as remains (x)) from him (y).

(s) *Alexander v. Rayson*, [1936] 1 K. B. 169, 190; *Berg v. Sadler and Moore*, [1937] 2 K. B. 158, 164. See also *Petherpermal Chetty v. Munandi Servai* (1908), L. R. 35 Ind. App. 98, 103 (P. C., per Lord Atkinson).

(t) *Alexander v. Rayson*, at p. 190.

(u) *Sykes v. Beadon* (1879), 11 Ch. D. 170, 187.

(x) *Bone v. Ekless* (1860), 5 H. & N. 925; 157 E. R. 1450.

(y) *Sheppard v. Oxenford* (1855), 1 K. & J. 491; 69 E. R. 552; *Greenberg v. Cooperstein*, [1926] Ch. 657; *Barélay v. Pearson*, [1893] 2 Ch. 154; *Sykes v. Beadon* (*supra*), at pp. 192, 193.

In *Hastelow v. Jackson* (z) the plaintiff and another deposited money in the hands of a stakeholder to abide the event of an illegal boxing match between them. After the battle there was some dispute as to who was the winner. The plaintiff having been adjudged the loser nevertheless claimed the whole of the stake money. The stakeholder, however, paid it to the winner, whereupon the plaintiff brought his action against the stakeholder to recover his own stake. It was held that he was entitled to succeed. "If two parties enter into an illegal contract", said Littledale, J. (a), "and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, *viz.*, where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it, and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done."

There is one exception, equitable in its origin, to the rule that no recovery will be allowed where the illegal purpose has been partly or wholly accomplished, *viz.*, in the case of marriage brokerage contracts. A marriage brokerage contract is a contract for reward to procure or negotiate for another a marriage whether with a specified or an unspecified person. These contracts were originally valid at common law. In equity, however, they were frowned upon and regarded as illegal; and equity would order the repayment of money paid under them. This rule was later adopted by the common law and is now, by way of exception to the general principle of non-recoverability, the rule applicable in all Courts to marriage brokerage contracts (b).

4. *Duty of Agent or Trustee to Account.* A fourth and last exception to the principle of *turpis causa* sometimes occurs where the relation of principal and agent or trustee and beneficiary exists

(z) (1828), 8 B. & C. 221; 108 E. R. 1026.

(a) P. 226; E. R. 1028.

(b) *Hermann v Charlesworth*, [1905] 2 K. B. 123.

between the parties. It is clear that if property is acquired by one person by the actual doing of an illegal act as the agent of another, the principal cannot recover the property from the agent. So if A employs B to commit a robbery, A cannot sue B for the proceeds (c). And the position would be the same if A were to vest property in B upon trust to carry out some fraudulent scheme: A could not sue B for an account of the profits (d). But if B, who is A's agent or trustee, receives on A's account money paid by C pursuant to an illegal contract between A and C the position is otherwise and A can recover the property from B, although he could not have claimed it from C (e). In such cases public policy requires that the rule of *turpis causa* shall be excluded by the more important and imperative rule that agents and trustees must faithfully perform the duties of their office.

§ 126. Effect of Ignorance of Illegality

So far we have dealt exclusively with the case of initial illegality known to both of the contracting parties. What shall be said, however, if one only of the parties knows the contract to be illegal, the other being innocent: as when a married man contracts to marry a woman who believes him to be unmarried; or a printer undertakes to print a book which, unknown to him, is libellous or obscene; or a chemist undertakes to supply a drug which, unknown to him, is intended by the purchaser for an unlawful purpose; or a house-owner contracts to let his house to a person who, unknown to him, intends to use it for the purpose of prostitution? In such cases the contract is clearly unenforceable at the suit of the guilty party against the innocent party (f). Nor is any remedy by way of a claim on a *quantum meruit* or for money had and received open to the guilty party (g). *Ex turpi causa non oritur actio* is in full force and effect. But what is the position of the innocent party? He is entitled to proceed with the performance of the contract in the ordinary course until he discovers that it is illegal. Until then the printer may proceed with the printing of the libellous book, and the chemist may supply the drug which he has agreed to sell. But so soon as the innocent party obtains actual

(c) *Sykes v. Beadon* (1879), 11 Ch. D. 170, 195—197.

(d) See *Harry Parker, Ltd. v. Mason*, [1940] 2 K. B. 590.

(e) *Hastelow v. Jackson* (1828), 8 B. & C. 221, 224; 108 E. R. 1026, 1027; *Sykes v. Beadon* (1879), 11 Ch. D. 170, 194; *Alexander v. Rayson*, [1936] 1 K. B. 169, 189—190.

(f) *Alexander v. Rayson*, [1936] 1 K. B. 169.

(g) *Berg v. Sadler & Moore*, [1937] 2 K. B. 158.

knowledge of the illegal nature of the contract which he has entered into he becomes no longer entitled to perform or continue the performance of it. He who knowingly prints a libellous book or knowingly supplies drugs for the purpose of murder or abortion cannot justify his action, even within the domain of contract, by the plea that he was only performing a contract which he made when he was innocent of its illegal nature. If, after knowledge acquired, he begins or continues to perform the contract he makes himself *particeps criminis* with the guilty party (h). If the contract involves a transfer of property, however, and this has been completely effected before the innocent transferor discovers the illegality, the innocent transferor is not, upon discovering the illegality, entitled to recall his transfer and repossess the property. Thus in *Feret v. Hill* (i) it appeared that the lessee of premises had acquired the lease from the lessor for the purpose, unknown to the lessor, of using the premises as a brothel. The lessor having afterwards discovered the use to which the premises were put, evicted the lessee, who thereupon brought an action of ejectment and was held by the Court of Common Pleas entitled to succeed.

As to all acts of performance which the innocent party has done while ignorant of any illegality he is entitled to the appropriate remedy. If he has already completed his own part of the contract, he can enforce it as against the other party; if he has printed the book, or supplied the goods, he can recover the agreed price on the contract itself; and the other party will not be permitted to plead its illegality (k). If, on the other hand, he has performed the contract in part only, he can recover on a *quantum meruit* the value of what he has done (l). And even if he has done nothing in the way of performance, he can sue the guilty party as for a constructive breach of the entire contract, and recover the same damages as if the contract had been a lawful one repudiated and broken by the guilty party. A woman who has contracted to marry a married man whom she believed to be unmarried can sue him for breach of promise and recover the same damages as if he had been single (m). A merchant who contracts to sell and deliver goods and discovers before delivery that they are intended for an

(h) *Jennings v. Throgmorton* (1825), Ry. & Mood. 251; 171 E. R. 1011; *Cowan v. Milbourn* (1867), L. R. 2 Ex. 230, 235.

(i) (1854), 15 C. B. 207; 139 E. R. 400; see also *Alexander v. Rayson*, [1936] 1 K. B. 169, 184.

(k) *Blozsome v. Williams* (1824), 3 B. & C. 232; 107 E. R. 720, *Fletcher v. Harcot* (1622), Hutton 55; 123 E. R. 1097.

(l) *Clay v. Yates* (1856), 1 H. & N. 73; 156 E. R. 1123

(m) *Spiers v. Hunt*, [1908] 1 K. B. 720, 723.

illegal purpose may sue for damages as for non-acceptance without offering to deliver the goods. In such cases it would appear that the plaintiff recovers "not upon the footing that the defendant could fulfil the contract and had failed to do so, because the contract could not have been fulfilled before the action was brought, but upon the ground of estoppel or warranty of capacity" or legality (*n*). As to anything which the originally ignorant party does by way of performance after he knows that the contract is illegal, however, he can recover nothing.

What shall be said if neither party is aware of the illegality of the contract : as when a contract for the importation of goods is made in ignorance of an outbreak of war, or a contract to marry is made under the mistaken belief that the former husband or wife of one of the parties is dead? In such cases the contract is wholly void, except so far as it may contain an express or implied warranty that performance is lawful and possible. But there is no reason for applying to such a case the maxim *ex turpi causa non oritur actio*, and there exists between the parties the same rights of *restitutio in integrum* as would exist in the case of a contract void *ab initio* for any reason other than illegality (*o*).

Where an executory contract is capable of being performed in a lawful or an unlawful manner and the parties are not shown to have intended the illegal manner of performance knowing of its illegality, the contract will not be void, but will be presumed to be a contract for performance in the lawful manner (*p*).

§ 127. Securities for Illegal Contracts

An important instance of the illegality of one transaction extending to invalidate another (*q*) occurs where a security is given in respect of an illegal transaction.

A security is any act in the law which makes more assured the performance of some primary obligation (*r*). Thus a conveyance by way of mortgage is a security for the performance of the debt created by the covenant to repay the loan ; a guarantee is a security for the performance of the obligation guaranteed ; and a negotiable instrument, as, *e.g.*, a cheque, given by a debtor to his creditor

(*n*) *Ib* Cf. *Wilson v Carnley*, [1908] 1 K. B. 729, 736-7, 741-2.

(*o*) *Oom v Bruce* (1810), 12 East 225 ; 104 E. R. 87 ; *Hentig v. Staniforth* (1816), 5 M. & S. 122 ; 105 E. R. 996.

(*p*) *Vaugh v. Morris* (1873), L. R. 8 Q. B. 202 ; *Hindley & Co. v. General Fibre Co.*, [1940] 2 K. B. 517. Cf. pp 361, 362, *post*.

(*q*) At p. 341, *ante*.

(*r*) Cf. the definition given in Stroud's Judicial Dictionary *sub nom.* Security.

(unless it appears to have been taken in discharge of the debt (s)) is a security for the debt.

A security which is of an executory character, whether in the form of a deed (t), negotiable instrument (u), guarantee (x), or otherwise, given in respect of an illegal transaction is itself tainted with the illegality and void. The position of such a security appears very clearly from the decision of the Exchequer Chamber in *Fisher v. Bridges* (y). In that case the plaintiff agreed to sell to the defendant certain lands. Pursuant to this agreement the lands were duly conveyed to the defendant, who thereupon executed a deed whereby he covenanted with the plaintiff to pay him the balance of the purchase price. The plaintiff having sued on the deed, the defendant pleaded that it was void for illegality inasmuch as the original agreement had been made "to the intent, and in order, and for the purpose, as the plaintiff at the time of the making of the said agreement well knew", that the land should be sold by lottery, contrary to statute. The Queen's Bench (z) held this plea insufficient as not alleging that the deed was made pursuant to the illegal agreement. "I draw a distinction", said Erle, J. (a), "between cases where the object of the contract is to carry out an illegal purpose as yet unexecuted, and cases where the illegal purpose has come to an end, and the party only says I owe you something for having broken my illegal promise to you, and I give you this security to indemnify you." The case, the Court thought, was like that where a man who has in the past had illicit relations with a woman, in consideration of those past relations gives a bond to provide for her maintenance. Such a bond is clearly good. In the Court of Exchequer Chamber, however, the judgment of the Queen's Bench was reversed. "It is clear", said Jervis, C.J. (b), delivering the judgment of the Court, "that the covenant was given for payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality." The

(s) *Re Romer & Haslam*, [1893] 2 Q. B. 286, 296

(t) *Fisher v. Bridges* (1854), 3 E. & B. 642; 118 E. R. 1283, *Geere v. Mare* (1863), 2 H. & C. 339; 159 E. R. 141.

(u) *Ex p. Mather* (1797), 3 Ves. 373; 30 E. R. 1060.

(x) *Swan v. Bank of Scotland* (1836), 10 Bligh (N.S.) 627; 6 E. R. 231

(y) *Supra*

(z) 2 E. & B. 118; 118 E. R. 718

(a) At p. 126; E. R. at p. 716.

(b) 3 E. & B. 642, 649; 118 E. R. 1283, 1285.

learned Judge then proceeded to distinguish the cases concerning past illicit cohabitation. "The case of *Beaumont v. Reeve* (8 Q. B. 483), much relied upon in the Court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not therefore illegal considerations. They are no consideration at all: and inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant, to pay a sum of money tainted with illegality, can be enforced merely because a bond for maintenance, founded upon past cohabitation or previous seduction, is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced."

Where the security is of an executed nature, as, *e.g.*, a conveyance by way of mortgage, a deposit by way of pledge, or the like, the position would appear to be somewhat different. The security would be no more valid as a security than would an executory security. But on the principle *in pari delicto potior est conditio defendentis* (c) the person who provided it could hardly claim to have it set aside simply because it was given in respect of an illegal transaction (d). If, however, the case could be brought within any of the exceptions to the general rule against restitution (e) such relief would be available (f).

§ 128. Severability of Illegal Contracts

Where a contract affected by illegality contains terms which in themselves are innocent can these terms be enforced and only the balance of the contract be regarded as tainted with illegality? The answer to this question may in a general way be given in the words of Willes, J., in *Pickering v. Ifracombe Ry.* (g): "The general rule of law is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created

(c) See p. 345, *ante*.

(d) *Scarfe v. Morgan* (1838), 4 M. & W. 270; 150 E. R. 1430; *Taylor v. Chester* (1869), L. R. 4 Q. B. 309. Cf. *Tregoning v. Attenborough* (1830), 7 Bing. 97; 131 E. R. 37. See note (d), p. 347, *ante*.

(e) See p. 346, *ante*.

(f) *E.g.*, *Whitmore v. Farley* (1881), 45 L. T. 99; 14 Cox C. C. 617.

(g) (1868), L. R. 3 C. P. 235, 250.

by statute or by the common law, you may reject the bad part and retain the good " (h).

In many cases, indeed, there can be no question of severance because although certain terms of the contract may in themselves be innocent, they may yet all be subsidiary to or dependent upon a term which is illegal. That term in such a case will constitute the major purpose of the contract and the other terms will be significant only because they are intended to subserve that major purpose (i). Thus suppose that an English importer should order from an overseas manufacturer for delivery in England goods the import of which into England was prohibited. If the goods, being smuggled into England, should prove to be of a quality inferior to that warranted, the importer nevertheless could not sue in the English Courts for breach of warranty, for the warranty would be merely subsidiary to and dependent upon the major and illegal purpose of importing prohibited goods.

On a like principle an entire contract, although in itself innocent, may yet be void for illegality because it is overshadowed by some extrinsic illegality which infects every part of it (k).

Apart from such cases as these, however, it is said that where the consideration for a promise is in part illegal, the promise itself will be void; but where several promises some legal and some illegal are made upon a consideration which is legal, the illegal promises may be severed from the legal, and the legal promises be enforced. "The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, and therefore you cannot sever the legal from the illegal part. But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent one upon another" (l). In other words, if the illegality, not being such as to infect the whole contract in the manner already explained (m), is in a term of the contract which

(h) As to a distinction formerly taken between illegality by statute and illegality at common law, see *ib.*

(i) *Biddell v. Leeder* (1823), 1 B. & C. 327, 335; 107 E. R. 122, 125.

(k) *E.g.*, *Foster v. Driscoll*, [1929] 1 K. B. 470; *Alexander v. Rayson*, [1936] 1 K. B. 169.

(l) *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, *per* Lopes, L.J., 713.

(m) See *supra*.

is exclusively for the benefit of the party seeking to enforce the contract, and he is willing to waive performance of that term, then despite the illegality the balance of the contract will stand good (n).

Thus in *Kearney v. Whitehaven Colliery Co.* (o) a contract of employment between a colliery company and a miner provided for, *inter alia*, an illegal deduction from the miner's wages and that if either party desired to terminate the employment that party should give fourteen days' notice to the other. The miner, having left his employment without giving the specified notice, was sued by the company for breach of contract. He pleaded that the entire contract was bad for illegality but the Court of Appeal were of the contrary opinion. "In the contract before us", said A. L. Smith, L.J. (p), "the master agrees to employ the man, who, in consideration that the master will take him into his employment and pay him wages, promises to serve the master, and not to leave the employment without fourteen days' notice. Both considerations from the man to the master and from the master to the man are good. Then there is one promise—that with respect to the deductions—which is illegal and cannot be enforced. But the promise which the master is here seeking to enforce against the servant is not illegal. It is founded upon a good consideration . . ."

With *Kearney v. Whitehaven Colliery Co.* may be compared *Hopkins v. Prescott* (q). There the plaintiff in consideration of the defendant's promise of £300, promised to sell his law stationer's business to the defendant (which was, of course, lawful) and to endeavour to have the defendant appointed to a public office. Traffic in public offices is illegal, and the Court refused to enforce the contract at the suit of the plaintiff. The illegality was in the consideration for the promise sued upon. It was in a stipulation benefiting the defendant, performance of which could not therefore be waived by the plaintiff.

If, then, the illegality is in respect of one of several promises given by one party to the other and that promise has been performed, can either party proceed to enforce the residue of the contract against the other? It is submitted not. The principle of severance, it is submitted, is limited by the principle of repentance (r).

(n) Cf. *Hawksley v. Outram*, [1892] 3 Ch. 359. As to when a term is exclusively for the benefit of a party see *Fibrosa v. Fairbairn, etc., Ltd.*, [1942] 1 K. B. 12, 20-1.

(o) [1893] 1 Q. B. 700.

(p) P 714.

(q) (1847), 4 C. B. 578; 136 E. R. 634.

(r) See pp. 349 *et seq.*, *ante*.

It is one thing to allow the parties to repent and abandon that part of their contract which is illegal, leaving the residue good; but it is quite another to aid them in the enforcement of the contract once performance of the illegal provision has been rendered and accepted.

Illegal Part must be Distinct from Rest. Before the illegal part of a contract may be severed from the rest the illegal part must be sufficiently distinct from the rest for severance to be possible. "From *Pigot's Case* (6 Coke's Rep. 26) to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot" (s). When, then, can it be said that the particular contract contains a series of "distinct engagements"? This is a question which may on occasion be far from easy to answer. It has been considered chiefly in respect of covenants in restraint of trade (t) and judicial opinion is by no means uniform on the matter. The different viewpoints may be illustrated by reference to the cases of *Goldsoll v. Goldman* (u) and *Attwood v. Lamont* (x).

In *Goldsoll v. Goldman* the covenantor undertook not to be concerned in "the business of a vendor of or dealer in real or imitation jewellery in the County of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stephens Kirche, Vienna". This covenant was excessive because it applied to real jewellery and extended beyond the United Kingdom and the Isle of Man. The Court of Appeal held, however, that the covenant might be modified by striking out the offending parts and the balance enforced. The principle thus exemplified has been described as the "blue pencil principle". It has been judicially expounded as follows (y): "The Courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise. To

(s) *Bank of Australasia v. Breillat* (1847), 6 Moo P. C 152, 201; 13 E R. 642, 660.

(t) Such covenants, where excessive, are not illegal but nugatory. See p. 368, post

(u) [1915] 1 Ch. 292.

(x) [1920] 3 K. B. 571

(y) *Bailhache, J., Attwood v. Lamont*, [1920] 2 K. B 146, 155.

give an illustration a covenant 'not to carry on business in Birmingham or within 100 miles' may be severed so as to reduce the area to Birmingham, but a covenant 'not to carry on business within 100 miles of Birmingham' will not be severed so as to read 'will not carry on business in Birmingham'."

In *Attwood v. Lamont* (z) a party covenanted not to be concerned in any of the trades "of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter", and one of the questions considered by the Court of Appeal was whether the covenant could be severed by striking out the names of trades other than that of a tailor. The Court held that such a severance was not permissible. Lord Sterndale, M.R., preferred (a), to the blue pencil test, the test of whether "the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants". Younger, L.J., in a judgment in which Atkin, L.J., concurred, said (b): "The learned Judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only."

In truth the rules as to severance stand in much need of an authoritative reconsideration and restatement.

§ 129. Supervening Illegality

We pass now to the case of supervening illegality—the case where a contract originally lawful becomes illegal in respect of its performance by the happening of some subsequent event, such as the outbreak of war and the resulting prohibition of commercial intercourse between the contracting parties.

Where supervening illegality is caused by the wilful act of one of the parties, whereby the lawful performance of the contract has been made impossible, the case is the same as if the contract had

(z) [1920] 3 K. B. 571.

(a) At p. 578.

(b) At p. 593.

been dissolved by breach thereof (c). If a man promises to marry one woman and then marries another, the first of them has the same right of action for damages as if the contract had remained lawful and had been broken (d).

Where the supervening illegality is not due to the act of either party, but results from an event for which neither of them is responsible, such as an outbreak of war, the case is doubtless governed by the same principles as determine the dissolution of contracts by frustration (e). Every lawful contract is subject to the condition that it shall remain lawful up to the time of performance. On the failure of this condition the contract is determined as from the date of such failure, with the same results on the rights of the parties in respect of intervening acts of performance as in the case of supervening impossibility of performance for any other reason than illegality. The case of supervening illegality is not, indeed, identical with that of supervening frustration on other grounds. For the condition in the case of illegality is a legal condition imposed upon the contract *ab extra* by the law itself, and not a conventional condition forming an implied term of the contract as in the ordinary case of frustration. The law does not read into the contract an implied condition dependent on the presumed intention of the parties that the contract shall determine if it becomes illegal. The law imposes this condition upon the contract for itself without regard to the intention of the parties, just as it imposes the condition that the contract shall not have been procured by fraud; and the condition would exist even if the parties had expressly agreed to the contrary. But the effects of the determination of a contract by this failure of the external condition of continued legality are presumably exactly the same as those of its determination by the failure of an implied condition that it shall remain possible of performance. The question, therefore, of *restitutio in integrum* in the case of supervening illegality is not to be determined by the application of the maxim *ex turpi causa non oritur actio*, but by the application of the same principles which are in force with respect to the frustration of contracts for any other reason.

Where a contract provides for alternative methods of performance and illegality subsequently attaches to one or more but not to

(c) Cf. *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935]

A. C. 524.

(d) *Short v. Stone* (1846), 8 Q. B. 358; 115 E. R. 911.

(e) *Esposito v. Bowden* (1857), 7 E. & B. 763, 119 E. R. 1430; see Chapter XXI, p. 503, *infra*.

all of them it is a question of construction whether the contract is avoided thereby (f). Ordinarily, however, it will not be void but will be regarded as though the illegal alternatives did not appear in it. Thus in *Hindley & Co. v. General Fibre Co.* (g) a contract for the sale of goods provided that they were to be shipped from Calcutta to Hamburg, Antwerp, Rotterdam, or Bremen at the buyer's option. Some days after war had broken out between England and Germany the buyer purported to elect to have delivery at Bremen. Such a delivery would have been illegal under the Trading with the Enemy Act, 1939. Subsequently the buyer called for delivery at Antwerp. It was held by Atkinson, J., that the first election was a nullity, but the second valid and effectual.

In *Hindley & Co. v. General Fibre Co.* the illegality attached to the alternative first chosen before the choice was made. It would seem that the position would not have been different, however, had the illegality attached after the first choice had been made (h).

§ 130. Nugatory Contracts

From contracts which are void for initial illegality must be distinguished contracts void *ab initio* for other reasons. A contract may be void *ab initio* for many reasons other than illegality. Most of these reasons relate to the manner or form in which the contract is made. A contract may be void for want of contractual capacity, or for want of formality, or for want of consideration, or for want of the necessary *consensus ad idem*. Other contracts, though made in the proper manner and by persons possessed of the requisite contractual capacity, are void because of the nature of their terms or contents. The undertakings or conditions contained in them are not those to which the law will give effect. Some of the contracts void for these reasons are not merely void, but are also illegal, and the law relating to these has now been considered. But there are many other contracts which are void because of their terms, but which are not also illegal. A wager is not an illegal contract, but it is a void contract (i); and it is void not because of any defect in the manner of its making or in the capacity of the parties to it, but merely because its contents are not such as the law recognises as the proper subject-matter of a valid contract. There is no recognised name for contracts of this description. A distinguishing

(f) *The Teutonia* (1872), L. R. 4 P. C. 171, 182.

(g) [1940] 2 K. B. 517.

(h) *Ib* at p. 525; *The Teutonia*, *supra*.

(i) *Hyams v Stuart King*, [1908] 2 K. B. 696

title, however, is requisite. It is not sufficient merely to call them void contracts, for there are many other kinds which are equally void but for other reasons. We may venture to call them *nugatory* contracts. Under this title we shall include all contracts which though they fulfil all other requisites of a valid contract are nevertheless void because of the nature of their terms and contents, but are not at the same time illegal. They are nugatory because, although made in all respects in manner required by law for a valid contract, they are nevertheless made *in vain*, because the law refuses to recognise and enforce contracts of such a content.

The distinction between a nugatory contract and an illegal contract—between one which is merely void and one which is both illegal and void—is essential. As we shall see (*k*), different rules of law apply to illegal and nugatory contracts respectively, and in particular the maxim *ex turpi causa non oritur actio* has no application to nugatory contracts, but applies exclusively to those which are illegal. Although, therefore, neither kind of contract can be enforced, the legal position of the parties to them is different. It is important, therefore, but not always easy, to ascertain whether a void contract belongs to the one class or the other.

§ 131. Grounds on which Contracts may be Nugatory

Contracts may be nugatory for different reasons.

1. Declared Nugatory by Statute. In the first place, they may be declared to be nugatory by statute, on the ground that the enforcement of such contracts in a Court of law is inexpedient. By way of example we may take wagering contracts.

“A wagering contract”, said Hawkins, J., in a much-quoted passage (*l*), “is one by which two persons, professing to hold opposite views touching the issue of a future (*m*) uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he shall so win or lose, there being no other real consideration for the making of such contract by either of the parties. It

(*k*) See p. 375, *post*.

(*l*) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, 490.

(*m*) The event or matter upon which the wager is to depend need not necessarily be future; there may be a bet on the length of St. Paul's (Anson, *Contracts* (18th ed.), 212), or whether a particular horse won a race in a certain year (Halsbury, *Laws of England* (2nd ed.), vol. 15, 474 n (*a*)).

is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract" (n).

Wagering contracts were valid at common law. By section 18 of the Gaming Act, 1845, however, it was provided that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise" (o).

The effect of this provision is to avoid wagers, but not to make them illegal (p). As was said by Sir Gorell Barnes, P., in *Hyams v. Stuart King* (q), "it is to be observed that there was nothing illegal in the strict sense in making the bets. They were merely void under 8 & 9 Vict. c. 109, and there would have been no illegality in paying them". And Farwell, L.J., in the same case said (r): "All betting is not illegal because in certain places and under certain conditions it is made an offence by Act of Parliament, nor because bets which were enforceable as contracts at common law have been made by statute unenforceable as void or on an illegal consideration. There is certainly nothing illegal in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word."

2. Contrary to Some Rule of Law Peremptorily Establishing the Terms of the Relationship Between the Parties. In the second

(n) For a detailed consideration of the nature of a wager, see Anson, *op. cit.*, 211—214; Halsbury, *op. cit.*, pp 469—475; and *Ellesmere v. Wallace*, [1929] 2 Ch. 1.

(o) As to the proviso see *Ellesmere v. Wallace*, *supra*.

(p) Cf. the Legislature's treatment of lotteries: see p. 338, *ante*. For the distinction between a wager and a lottery see *per Russell, L.J.*, in *Ellesmere v. Wallace* (*supra*), at pp. 49 ff

(q) [1908] 2 K. B. 696, 707.

(r) At p 725.

place, such a contract may be an attempt to alter, exclude or supersede by the consent of the parties some peremptory rule of law which governs their relationship to each other, and which cannot be so affected by their agreement to the contrary. A contract so made in a matter which is not subject to the maxim *modus et conventio vincunt legem* is necessarily inoperative and nugatory, since the law prevails over the contract instead of the contract prevailing over the law. Thus a term in a contract of service between a master and his servant purporting to exclude the liability of the master to pay compensation under the Workmen's Compensation Act, 1925, is, unless it complies with the conditions of the Act, nugatory and void (s). So is any other agreement which attempts to transform into a relationship of contract one which has been already made by the law a relationship of status beyond the reach of agreements to the contrary. Thus an agreement by parties entering into a marriage that nevertheless they shall not be under any obligation to each other to cohabit is nugatory (t).

3. Unreasonable and Oppressive. In the third place, contracts are nugatory which are regarded by the law as unfit for legal enforcement by reason of their unreasonable and oppressive nature. There is, indeed, no general rule which prevents persons from validly entering into any contracts which please them, however oppressive, unreasonable, or absurd their terms may be. In general the law will enforce agreements without regard to any such consideration. Indeed, the common law resolutely refused in any case to exempt the parties to a contract from their agreed obligations on any such ground. What they chose to promise they must perform. The rigour of the common law in this respect has been modified by the development of a limited equitable jurisdiction to grant relief from contracts on this ground. The result is the recognition of certain kinds of nugatory contracts or contractual terms. A promise, for example, by one contracting party to pay to the other a pecuniary penalty for a breach of the contract is nugatory and void. The legally appointed and proper remedy for a breach of contract is damages assessed by a Court of law, and the parties are not at liberty to substitute a penalty in lieu thereof or in addition thereto. They are at liberty, however, to agree in their contract as to what the damages for a breach thereof shall amount

(s) 15 & 16 Geo. 5, c. 84, ss. 1 (3), 21—28.

(t) *Brodie v. Brodie*, [1917] P. 271.

to, or to agree that the damages shall not exceed a fixed sum. The subtle distinction thus recognised by the law between an agreement for a *penalty*, which is nugatory, and an agreement for what is called *liquidated damages* is one which has not unnaturally given rise to much difficulty and uncertainty in its application (u).

So the contract known as a bond with conditions is nugatory so far as the penalty of the bond is concerned. The bond is operative merely as a security for the performance of the conditions, and can be enforced only to the extent of the pecuniary interest which the other party has in such performance (x). So a contract for the forfeiture of a security to the creditor on the default of the debtor in payment of his debt on the due date is nugatory and void (y). So, in a contract for the loan of money at interest, a term providing that if the debtor makes default in payment of interest on the due date he shall pay interest at a higher rate is treated as an agreement for a penalty and is nugatory. Absurdly enough, the law has allowed this rule to be evaded by recognising as valid an undertaking to pay interest at the higher rate, subject to the condition that interest paid on the due date at a lower rate will be accepted by the creditor in full satisfaction (z).

4. Contrary to Public Policy. In the fourth place, and more generally, many kinds of contracts are nugatory because the common law regards their making, their performance, or their enforcement as contrary to the public interest. Such contracts are said to be against public policy (a).

(u) See p 580, *post*

(x) 8 & 9 Will. 3, c 11, s 8; 4 & 5 Anne, c 16, ss. 12 and 13.

(y) This is the principle of the mortgagor's equity of redemption. See Hanbury & Waddock, *Law of Mortgages* (1938), pp 83 ff.

(z) *Union Bank of London v Ingram* (1880), 16 Ch. D. 53. See Jessel, M R., in *Wallis v. Smith* (1882), 21 Ch. D. at pp 260—261

(a) "Whatever is injurious to the interests of the public is void, on the grounds of public policy": *per* Tindal, C J, in *Horne v Graves* (1831), 7 Bing 735, 743; 131 E. R. 284, 287. In *Janson v Driefontein Consolidated Mines*, [1902] A. C. 484, 491, it was said by Lord Halsbury, L.C., "I deny that any Court can invent a new head of public policy". Taken literally this statement appears to be inconsistent with the history of this branch of the law and with many modern decisions. See *per* McCardie, J., giving ample citations, in *Naylor, Benzon & Co. v. Kramische Industrie Gesellschaft*, [1918] 1 K. B. 331, 342. Notwithstanding Lord Halsbury's *dictum*, it seems that the doctrine of public policy is characterised by a not inconsiderable measure of flexibility, and that it is capable of being applied in novel situations involving the public interest; but novel applications of the doctrine should only be made in "clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds". *Per* Lord Atkin, *Fender v. St. John-Mildmay*, [1938] A. C. 1, 12. See also *per* Lord Thankerton, p. 23, and Lord Wright, p. 40; and Pollock, *Contract* (11th ed.), pp. 293—297. Cf. Lord Wright in 59 L. Q. R. 125

(i) *Preservation of Liberties of Contracting Parties*

An important head of public policy relevant in the present connection is the preservation of a proper measure of individual liberty, and for this reason contracts are nugatory and void which, in the view of the law, represent such an infringement of the liberty of the contracting parties as to injure the public interest.

(a) **RESTRICTION OF PERSONAL LIBERTY.** On this principle a contract whereby a person purports to subject himself to such restrictions on his personal liberty as are incompatible with his status as a free member of the community is nugatory. "The law of England allows a man to contract for his labour, or allows him to place himself in the service of a master (b), but it does not allow him to attach to his contract of service any servile incidents" (c). In *Horwood v. Millar's Timber and Trading Co.* (d) a party, in consideration of a loan from a moneylender, assigned his salary by way of security, and covenanted that he would not without the moneylender's consent determine his engagement with his employers; and that he would not borrow any money, or deal with his furniture, or obtain credit, or allow anyone to pledge his credit (except his wife for ordinary household accounts for weekly settlement) or make himself or his property answerable for money whether legally or morally; or without the lender's consent, move from the dwelling-house occupied by him. The Court of Appeal held this contract void as being contrary to public policy. "If ever there was a contract", said Warrington, L.J. (e), "which placed a man under servile obligations towards the other contracting party this contract is that contract." And earlier in his judgment the learned Lord Justice said: "The man has put himself, one may say, almost body and soul in the power of this moneylender. Even in the most trivial incidents of life he cannot do as he pleases; he can only act in a way to which this moneylender will consent" (f).

(b) **RESTRAINT OF MARRIAGE.** Similarly, contracts are void which are in general restraint of marriage—a contract, for example, by which a party precludes himself from marrying at all or imposes

(b) He may, indeed, contract to serve for the period of his life: *Wallis v. Day* (1837), 2 M. & W. 273; 150 E. R. 759.

(c) Bowen, L.J., *Davies v. Davies* (1887), 36 Ch. D. 359, 393

(d) [1917] 1 K. B. 305.

(e) At p. 311

(f) See also *King v. Michael Faraday and Partners, Ltd.*, [1939] 2 K. B. 753, 763 ff. Cf. *Denny's Trustee v. Denny*, [1919] 1 K. B. 583.

unreasonable restrictions on his liberty of doing so (g). Partial restrictions, if reasonable, are lawful. Most of the cases deal with conditions attached to gifts by will, but the principle applies equally to contracts. Thus an undertaking or condition is good which merely precludes marriage with a person of a particular nationality (h), or of a particular religion (i), or of a particular class, as e.g., a domestic servant (k), or with a named person (l), or with a second husband or wife (m). And it has been held that a covenant to pay an annuity of a certain amount to a single woman until her marriage and thereafter a smaller amount is not within the principle as to contracts in general restraint of marriage (n).

(c) RESTRAINT OF TRADE. On the same principle contracts are void which are in unreasonable restraint of trade. This matter has been differently dealt with by the law at different times and the rules from time to time current have been largely the reflections of contemporary conditions of trade, manufacture, and communications. "In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate v. Bacher* (o)). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. 'Where the restraint is general', says Lord Macclesfield, in *Mitchel v. Reynolds* (p), 'not to exercise a trade throughout the kingdom', the restraint 'must be void, being

(g) *Lowe v. Peers* (1770), 4 Barr. 2225; 98 E. R. 160.

(h) *Perrin v. Lyon* (1807), 9 East 170; 103 E. R. 538.

(i) *Duggan v. Kelly* (1847), 10 Ir. Eq. R. 295.

(k) *Jenner v. Turner* (1880), 16 Ch. D. 188.

(l) *Jarvis v. Duke* (1681), 1 Vern. 19; 23 E. R. 274.

(m) *Allen v. Jackson* (1875), 1 Ch. D. 399.

(n) *Webb v. Grace* (1848), 2 Ph. 701; 41 E. R. 1114.

(o) (1602), Cro. Eliz. 872; 78 E. R. 1097.

(p) (1712), 1 P. Wms 181; 24 E. R. 347.

of no benefit to either party and only oppressive, as shall be shown by-and-by'. Later on he gives his reason. 'What does it signify', he says, 'to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other' (q).

The foundation of the modern law on the topic is the celebrated *Nordenfelt Case* (r) in the House of Lords, and the judgment in that case most frequently cited is Lord Macnaghten's (s). In an often-quoted passage Lord Macnaghten thus states the considerations by which the Courts at this present day are guided (t): "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

As between the parties a restraint of trade will be deemed to be reasonable only if it goes no further than is necessary to protect some interest which the promisee is regarded by the law as entitled to protect against the promisor (u). "What was it against which the respondents were reasonably entitled to protect themselves?" Until this question is answered no answer is possible to the principal inquiry whether that which was stipulated for exceeded the reasonable needs of the case" (x). The extreme case of an excessive restraint occurs when there is no recognised interest to be protected at all and the restraint is simply a contract not to

(q) Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 564. See also *per* Younger, L.J., in *Attwood v. Lamont*, [1920] 3 K. B. 571, 581-2.

(r) See preceding note.

(s) *Att.-Gen. of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A. C. 771, 795; *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688, 699.

(t) [1894] A. C. at p. 565.

(u) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688, 700, 707; *Fitch v. Dewes*, [1921] 2 A. C. 158, 163, 169.

(x) Lord Birkenhead, L.C., in *McEllistrim v. Ballymacelligott, etc., Society*, [1919] A. C. 548, 563.

compete. In Lord Macmillan's words (y), "the Lord Chancellor stated (z) that 'the respondents were not entitled to be protected against mere competition', and so far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective".

The cases in which the Courts have recognised a particular interest as a legitimate subject for this form of protection have arisen almost, if not quite, entirely out of sales of goodwill, contracts of employment, and contracts intended to maintain the price at which goods produced or distributed by one or more of the parties are sold. In these several different types of case different aspects of the general problem assume special importance and it will be convenient to consider them separately.

Sales of Goodwill. The law considers that a purchaser of the goodwill of a business is entitled to protect his purchase against the vendor. Any promise by the vendor, therefore, which goes no further than is necessary to protect the business sold will be reasonable both in the interest of the purchaser and of the vendor. That such a promise will be reasonable in the purchaser's interest is apparent. It is reasonable in the interest of the vendor because it enables him to sell his business to the best advantage. If a purchaser were to be exposed to the risk of the vendor competing with him the price which that purchaser would pay for the goodwill would not be as great as if no such competition were to be feared (a). In such cases the main inquiry is whether or not the particular restraint is greater than is necessary for the protection of the goodwill which has been acquired. In the *Nordenfelt Case* (b) the business was that of manufacturing guns and ammunition for the purposes of war. Nordenfelt, who in the circumstances was to be regarded as in the position of vendor of the business, purported to bind himself for twenty-five years not to engage in a business of

(y) Delivering the judgment of the Privy Council in *Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries, Ltd.*, [1934] A. C. 181, 190.

(z) In *McEllistram, etc.*, *supra*, at p. 562.

(a) *Nordenfelt Case*, [1894] A. C. at 552; *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688, 701, 713.

(b) *Supra*.

that kind except on behalf of the purchaser, nor in any business competing or liable to compete in any way with that for the time being carried on by the purchaser. The earlier part of this covenant was upheld in the Court of Appeal and House of Lords; the latter part was rejected by the Court of Appeal (from whose decision on this point no appeal was brought) as not being necessary for the protection of the business sold but amounting to a bare covenant not to compete (c).

If in such cases the restraint is reasonable in the interests of the parties, it will almost always be reasonable in the interests of the public. In other words, in such cases it is generally only where the restraint is excessive from the point of view of the parties that it becomes unreasonable in the public interest. An interest of the public which may here require protection is that except in special circumstances persons should be free to exercise any legitimate professional or trade skill they may possess (d).

The principle of the goodwill cases has not been confined to cases in which the restrained party was himself the owner of the goodwill and business sold. It is enough that he should have a substantial interest in the sale and that he should have been so connected with the business that protection from his competition should be necessary to the purchaser's security. In the *Nordenfjelt Case* itself the business had been founded by Nordenfjelt, but when he gave the covenant it was owned by a company to whom he had sold it and of which he was a shareholder and managing director, and the covenant was given on the occasion of the resale of the business to another company (e).

Employment Cases. Here the same general principles apply, but the Courts, moved by the consideration that the employee in such cases is usually in a weaker bargaining position than the employer, scrutinise narrowly a restraint on the employee's activities which is to become operative only after (f) the employment has terminated (g). Furthermore, the interest which the employer may legitimately protect against his employee is comparatively limited. He is entitled to protect his professional or trade

(c) See also *British Concrete Co. v. Schelff*, [1921] 2 Ch. 563.

(d) *Connors Bros., Ltd. v. Connors*, [1940] 4 A. E. R. 179, 195; see also *Mason v. Provident, etc., Co.*, [1915] A. C. 724, 739, and *Fitch v. Dewes*, [1921] 2 A. C. 158, 166 (both the latter were cases of employment contracts).

(e) See also *Connors Brothers, Ltd. v. Connors*, [1940] 4 A. E. R. 179, 190-1.

(f) *Warner Bros. v. Nelson*, [1937] 1 K. B. 209, 214.

(g) *Mason v. Provident, etc., Co.*, [1915] A. C. 724, 732, 737-8.

connection (*h*) and trade secrets (*i*). He is not, however, entitled after the employment has ended to prevent the employee from using, either on the employee's own account or in the service of a trade rival of the employer, the skill which he has acquired in the course of his service with the employer (*k*).

Price-maintenance Arrangements. These may be divided into at least two groups. The first comprises cases where a number of persons engaged in the same trade or industry agree to maintain the price of their product by co-operating to regulate the output and distribution of that product (*l*). The second comprises cases in which a manufacturer or distributor of a particular article obtains from those buying from him a contract not to retail the goods at less, or other, than specified prices (*m*).

In these cases the importance of the requirement that a restraint of trade must be reasonable as between the parties has tended to recede. The parties meet on terms of equality and in the absence of special circumstances are regarded as being the best judges of their own interests (*n*). On the other hand the reasonableness of the arrangement from the public viewpoint has received more attention than in the other restraint of trade cases (*o*), and it has been laid down that although such a restraint may be reasonable as between the parties it will still be bad if it is calculated to produce a pernicious monopoly, *i.e.*, a monopoly calculated to enhance prices to an unreasonable extent (*p*). Nevertheless, where the contract is reasonable as between the parties the burden of showing that it is unreasonable in the public interest is no light one (*q*). In 1913 no case was known to the Judicial Committee where this had been done and none appears to have occurred since that time (*r*). Some indication of what might constitute a restraint

(*h*) *Fitch v. Dewes*, [1921] 2 A. C. 158

(*i*) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688.

(*k*) *Mason v. Provident, etc., Co.*, [1913] A. C. 724, 740; *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688, 704, 706.

(*l*) *E.g.*, *Joseph Evans & Co., Ltd. v. Heathcote*, [1918] 1 K. B. 418; *McEllistrim v. Ballymacelligott, etc., Ltd.*, [1919] A. C. 548; *English Hop Growers, Ltd. v. Dering*, [1928] 2 K. B. 174.

(*m*) *E.g.*, *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co.*, [1915] A. C. 79; *Palmolive Co. v. Freedman*, [1928] Ch. 264; *Imperial Tobacco Co. v. Parslay*, [1936] 2 A. E. R. 515.

(*n*) *Palmolive v. Freedman*, [1928] Ch. 264, 271, 274; *English Hop Growers v. Dering*, [1928] 2 K. B. 174

(*o*) *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 460, 471.

(*p*) *Att.-Gen. of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781, 795; *McEllistrim v. Ballymacelligott, etc.*, [1919] A. C. 548, 563.

(*q*) *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 461, 473.

(*r*) [1913] A. C. 795; [1928] Ch. 282

unreasonable in the public interest was given by Lawrence, L.J., in *Palmolive Co. v. Freedman* (s), where the Court of Appeal upheld a price maintenance agreement between the distributor of certain proprietary toilet preparations and a retailer. In the course of his judgment the learned Lord Justice said: "It is not as if the plaintiffs had acquired the control of the whole or of a substantial part of the output of some indispensable commodity (such as, for instance, coal or salt or even toilet-soap) and were endeavouring to force the members of the public to pay higher prices for goods which they were practically compelled to purchase. Moreover, even in such a case the mere intention to raise prices would not establish a case of injury to the public; it would still have to be proved that the intention was to raise the prices to an unreasonable extent; for no such intention would be inferred, the reason being that *prima facie* it would be highly improbable that the seller in his own interests would want to fix unreasonable prices."

General. The question of reasonableness is one of law for the Court (t). The burden of proving facts from which the restraint may be inferred to be reasonable as between the parties is upon the party seeking to uphold the restraint; the burden of proving facts from which a restraint, although reasonable as between the parties, may be inferred to be unreasonable in the public interest is upon the party attacking the restraint (u). The Court may of its own motion and although the parties do not take the point hold that a restraint is unreasonable in the public interest (x). A party in whose favour a restraint would operate has succeeded in attacking it on the ground that it gave him a measure of protection unreasonably extensive having regard to the interest for which he needed protection (y).

(ii) *Maintenance and Protection of Marriage*

Another head of public policy is the maintenance and protection of the institution of marriage. Accordingly, although a contract providing for an immediately contemplated separation of husband and wife which takes place forthwith upon the contract being

(s) [1928] Ch. 264, 282.

(t) *Mason v. Provident, etc.*, [1913] A. C. 724, 732.

(u) *Herbert Morris, Ltd. v. Sazelby*, [1916] 1 A. C. 688, 700, 708; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 461, 480.

(x) *Wyatt v. Kreglinger*, [1933] 1 K. B. 793, 806.

(y) *Joseph Evans & Co. v. Heathcote*, [1918] 1 K. B. 418; this decision, in Lord Atkinson's view, was "absolutely right": [1919] A. C. at 585.

entered into is good (z), a contract merely providing for the possibility of a separation occurring in the future is bad as tending to bring about such a separation (a).

(iii) Performance of Parental Duty

On a similar principle contracts which interfere with the due performance of parental duty are nugatory and void. Accordingly it has been held that a contract is void whereby a mother agrees to assign to another her rights and liabilities in respect of her illegitimate child (b). Now, however, an adoption order may in a proper case be made by the Court under the Adoption of Children Act, 1926 (c), and this will have the effect of extinguishing the rights and duties of the parent and vesting them in the adopter (d).

(z) *Jee v. Thurlow* (1824), 2 B. & C. 547; 107 E. R. 487; *Marshall v. Marshall* (1879), 5 P. D. 19; *Hindley v. Westmeath* (1827), 6 B. & C. 200; 108 E. R. 427.

(a) *Westmeath v. Westmeath* (1831), 5 Bli. N. S. 339; 5 E. R. 349.

(b) *Humphreys v. Polak*, [1901] 2 K. B. 385.

(c) 16 & 17 Geo. 5, c. 29, s. 5 (1).

(d) It is by no means easy to determine, in many cases, whether a contract which is void as being against public policy is illegal or merely nugatory. On this problem Sir John Salmond wrote (*Salmond and Winfield*, p. 171) as follows: "It is often said that all contracts which are regarded by the law as contrary to public policy are for that reason illegal contracts. If all that is meant by this is that they are void and unenforceable the statement is correct in substance although inaccurately expressed. But if what is meant is that such contracts are illegal and void, as opposed to being merely nugatory and void, the proposition cannot, I think, be supported. As has been already indicated, the test of an illegal as opposed to a merely nugatory contract is the applicability of the maxim *ex turpi causa non oritur actio*, with the resulting refusal of all legal aid to the parties to the contract. There does not seem to be any sufficient justification or authority for the general extension of this rigorous maxim to all contracts which the law refuses to enforce as being contrary to public policy. A covenant in unreasonable restraint of trade is certainly void, but is it such a *turpis causa* as to induce the application of the law of illegal contracts? Is it to be classed for all purposes with contracts for the commission of crimes or of sexual immorality? It is true, of course, that many contracts which are contrary to public policy are not merely void but also illegal, for they may be immoral, or the fact that they are contrary to public policy may have led the common law to treat the making or performance of them as punishable misdemeanours or as civil injuries. On the other hand, there are many contracts which, though recognised by law as contrary to public policy, nevertheless do not involve any violation either of the law or of morality. The question is whether such contracts are to be classed as illegal or merely as nugatory—whether they are illegal and void, or merely void. Unfortunately, the authorities, as they stand, do not enable us to draw with any confidence or certainty the line of division between illegal and nugatory contracts. I have suggested that the only illegal contracts are those which involve, either in their making, performance, consideration, or purpose, a violation either of law or of sexual morality [cf. p. 337, *ante*]. It may be that this is too restricted a view of the matter, and that in certain cases contracts void as contrary to public policy are to be counted among illegal contracts, although neither illegal in the strict sense nor immoral, and are subject accordingly to all the rigour of the rule as to *turpis causa*. But unless all contracts void as contrary to public policy are to be so classed as illegal without distinction, I do not know on what principle a distinction is to be made between some of them and others."

§ 132. Severability of Nugatory Contracts

A contract may be nugatory either in whole or in part. That is to say, it may be void either in respect of the whole of its terms or in respect of some of them only. A contract is not necessarily wholly inoperative because one of its terms is nugatory. If the nugatory term is so far independent of the residue of the contract that the excision of that term will leave surviving a good contract based on good consideration, the law will cut out that term accordingly and leave the residue to operate without it. Thus if a contract of service between master and servant contains a covenant by the servant which is nugatory as being in unreasonable restraint of trade, the law will cut out that term, and treat the rest of the contract as valid (e).

The principles upon which severance is to be effected are for the most part the same as those applicable in cases of illegality. Where, however, the law is concerned to protect a party from oppression, as in cases of covenants between master and servant designed to safeguard the master from competition by the servant after the employment has ceased, the Courts tend to restrict very considerably the application of these principles. "It would, in my opinion", said Lord Moulton in *Mason v. Provident Clothing Co.* (f), "be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might have validly required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation in which the servant is usually at a great disadvantage in view of the longer purse of his master." So in *Horwood v. Millar's Timber and Trading Co., Ltd.* (g), where a contract for the loan of money contained terms which would have reduced the borrower, in the words of Lord Cozens-Hardy, M.R., to the position "of *adscriptus glebæ*", and also contained an assignment of salary by way of security, the Court of Appeal refused to enforce the assignment of salary.

§ 133. Differences Between Illegal and Nugatory Contracts

We have said that the chief difference between illegal and nugatory contracts is that the maxim *ex turpi causa non oritur*

(e) *Nordenfelt v. Maxim Nordenfelt, etc., Co., Ltd.*, [1894] A. C. 535.

(f) [1913] A. C. at p. 745.

(g) [1917] 1 K. B. 305. See p. 367, *ante*.

actio applies to the former but not to the latter (*h*). We must now consider in more detail the consequences of the non-application of the maxim to nugatory contracts. These consequences may be of importance in two types of case: first, where a party who has paid money, parted with property or rendered services pursuant to a nugatory contract seeks a remedy; and second, where the validity of a transaction collateral to or of a security given in respect of a nugatory contract is in question.

§ 134. Recovery in Respect of Money Paid. Property Parted With or Services Rendered under a Nugatory Contract

One who, having paid money, parted with property or rendered services under a contract which is nugatory, seeks a remedy in respect of this performance cannot be met with the defence of *in pari delicto potior est conditio defendentis*; he will therefore be able to recover in some cases where recovery would be impossible if the contract were illegal. We shall consider his position (1) at common law and (2) in equity.

(1) **Remedies at Common Law.** The remedies at common law of one who has entered upon the performance of a nugatory contract appear to be as follows. First, if, being the owner of land or chattels, his performance has taken the form of a delivery of possession of, but not the transfer of title to, land or chattels he may recover in respect of these in virtue of his ownership. Secondly, if he has delivered goods to the other party and that party retains them, or if the property in goods passes under the contract to that party (*i*), presumably he (the party making this performance) may recover the reasonable value of the goods. Thirdly, if he has rendered services he will be able to recover on a *quantum meruit* (*k*). Fourthly, if he has paid money, he can in certain circumstances recover it. No such recovery is, indeed, possible when the other party has completely executed his side of the contract (*l*), nor, it would seem, even where he has partly performed it so that the consideration for the payment cannot be said

(*h*) See p 363, *ante*.

(*i*) As to whether property in goods may pass under a nugatory contract consider *Elder v. Kelly*, [1919] 2 K. B. 179 (where the contract was illegal) and *Stocks v. Wilson*, [1913] 2 K. B. 235 (where the contract was void because one of the parties was an infant).

(*k*) Cf. *Craven-Ellis v. Canons, Ltd*, [1936] 2 K. B. 403.

(*l*) *Thistlewood v. Cracroft* (1813), 1 M. & S. 500; 105 E. R. 187; *Paterson v. Powell* (1832), 9 Bing. 320; 131 E. R. 635; *Hyams v. Stuart King*, [1908] 2 K. B. 696, 707.

to have wholly failed (*m*). Furthermore, if the payment was made by the payer with full knowledge of the facts but in the mistaken belief that the money was legally due from him to the payee, and the payee acted in the matter with good faith, the money cannot be recovered, (*n*). In other cases, however, and particularly where payment has been made not pursuant to any supposed obligation but as an executed consideration for a nugatory undertaking which has not been wholly or partially performed, the money may be recovered back (*o*).

(2) Remedies in Equity. There is no remedy at common law where the title to property (not being goods) has been conveyed or assigned in performance of a nugatory contract; and, as we have seen, recovery of money cannot be had at common law unless there is total failure of consideration, and not always even then. Where, indeed, the party from whom restitution is sought has wholly performed his side of the contract there seems to be no more reason to reopen matters in equity than at common law. Perhaps the same may be said where money has been paid with full knowledge of the facts but in the mistaken belief that it was legally due from the payer to the payee and the payee has acted in good faith. In other cases, however, it is not easy to see why the equitable doctrine of tracing (*p*) should not be applied and one who has paid money or conveyed property under a nugatory contract allowed to recover his money or property within the limits of that doctrine, of course on such terms as to restitution by himself as may be equitable.

§ 135. Securities for Nugatory Contracts: Transactions Collateral to Nugatory Contracts

If the security is intended to secure that the very thing is done which the law by rendering the principal contract nugatory seeks to discourage it would seem that the security would likewise be nugatory. Thus a bond to secure the performance of a general

(*m*) *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch 452.

(*n*) *Cadaval v. Collins* (1836), 4 A. & E. 858, 866; 111 E. R. 1006, 1009; *Kelly v. Solari* (1841), 9 M. & W. 54; 152 E. R. 24; *per Fry, L.J.*, in *Kearley v. Thomson* (1890), 24 Q. B. D. 742, 745; *Morgan v. Ashcroft*, [1938] 1 K. B. 49; *Sawyer v. Window Brace, Ltd.*, [1943] K. B. 32.

(*o*) *Tappenden v. Randall* (1801), 2 B. & P. 467; 126 E. R. 1388; *Aubert v. Walsh* (1810), 3 Taunt. 277; 128 E. R. 110; *Chappell v. Poles* (1837), 2 M. & W. 867; 150 E. R. 1010.

* (*p*) See p. 317, n. (*q*), *ante*.

undertaking by an unmarried person not to marry, or of a covenant in excessive restraint of trade, could hardly be held valid (q).

If, however, the element in the nugatory contract which the law intended to discourage has been performed, and a natural indebtedness has been created, a security for that natural debt will not be nugatory because the natural debt itself arose out of a nugatory contract. Where a contract is illegal the taint of illegality will spread to collateral transactions, but no such principle applies to nugatory contracts. The distinction may be illustrated by contrasting *Fisher v. Bridges* (r) with *Hyams v. Stuart King* (s). In *Fisher v. Bridges* a covenant by a party to an illegal contract to pay money which he would have owed had the contract been legal was held to be tainted by the illegality of the original contract and itself void for illegality (t). In *Hyams v. Stuart King*, on the other hand, a new promise, supported by adequate consideration, to pay moneys owing in respect of wagering contracts which were nugatory, was upheld. In such cases, however, the new promise must either be by deed, or else be supported by a sufficient consideration independently of the original contract. If the new promise takes the form of a bill of exchange, cheque or promissory note it may be saved by the rule of the law merchant (u) whereby valuable consideration given at any stage in the history of a bill, cheque or note will support that bill, cheque, or note.

Similar principles apply to transactions, other than securities, which are collateral to nugatory contracts. Thus before the Gaming Act, 1892, a contract whereby one party employed another as an agent to make bets was not vitiated by the nugatory character of the betting transactions, and if the agent, having in the course of his employment made a bet in his own name on his principal's behalf, paid any loss incurred, he could recover the amount from his principal (x). With regard to such cases as this, however, the Gaming Act, 1892, now provides as follows: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum

(q) Cf. *Anon.* (1589), Owen 34; 74 E. R. 880; *Baker v. White* (1690), 2 Vern. 215; 23 E. R. 740.

(r) (1854), 3 E. & B. 642; 118 E. R. 1283. See p. 355, *ante*.

(s) [1908] 2 K. B. 696. Cf. *per Atkinson, J.*, in *Norreys v. Zeffert*, [1939] 2 A. E. R. 187.

(t) See also *Genforskrings Aktieselskabet v. Da Costa*, [1911] 1 K. B. 137.

(u) Now declared in s. 27 (2), Bills of Exchange Act, 1882.

(x) *Read v. Anderson* (1884), 13 Q. B. D. 779. See also *Maskell v. Hull*, [1921] 3 K. B. 157.

of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Even before the Gaming Act, 1892, however, if an agent employed to make bets should omit to do so his principal could not recover damages for breach of the contract of employment. This was not because the contract of employment was nugatory, but because in contemplation of law no damage was suffered by the principal in not having nugatory contracts made on his behalf (y).

§ 136. Loans and Securities in respect of Gaming Transactions

The general rules stated in the preceding section are modified by statute in their application to gaming transactions.

Securities for Gaming Debts. The Gaming Act, 1710 (z), provided that "notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever" given by any person or persons whatsoever where the whole or any part of the consideration was for any money won by gaming or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever should be void. This enactment had the unfortunate effect of avoiding the security as against not only the original holder of it but also anyone who subsequently acquired it even though innocently and for value. Accordingly by section 1 of the Gaming Act, 1835, it was enacted that "every note, bill or mortgage" declared void by the earlier Act should instead be taken to have been made, drawn, accepted, given, or executed for an illegal consideration. Whether this provision has altered the position of a *bona fide* assignee of a mortgage originally given for money won by playing at games or betting on the players may be doubted. Such a mortgage if given for an illegal consideration would be void *ab initio* and it may well be, unless the statute is to be taken to provide by implication to the contrary, that the rule that the assignee of a chose in action takes subject to equities (a) would apply so that even in the hands of a *bona fide* assignee for value the mortgage would still be void (b). With respect to bills and notes (c), however, the Act of 1835 clearly improves the position of the innocent assignee for

(y) *Cheshire v. Vaughan*, [1920] 3 K. B. 240.

(z) S. 1, 9 Anne, c. 19 (sometimes printed as c. 14).

(a) See p. 471, *post*.

(b) See *Judd v. Green* (1875), 45 L. J. Ch. 108.

(c) Including cheques. *Moulis v. Owen*, [1907] 1 K. B. 746

value. It does this because it brings into operation the rule of the law merchant (*d*) that even although a bill or note should be made, issued, accepted or negotiated for an illegal consideration a person thereafter acquiring the bill or note is not affected if he proves that subsequently to the illegality value has in good faith been given for it.

Loans for Gaming. (1) Money knowingly lent to enable the borrower to gamble on a game described in the Gaming Act, 1710 (*e*), or lent at the time and place where such a game is played is irrecoverable. The reason is that the Act of 1710 expressly declared securities for such a loan to be void and must therefore be taken to have avoided the loan as well (*f*). At the present day the position of a security for such a loan is determined by the combined operation of the Act of 1710 and section 1 of the Act of 1835, and is the same as that of a security for money lost in gambling on a game described in the 1710 Act.

(2) Money lent and paid to the borrower to enable him to gamble otherwise than on a game described in the Gaming Act, 1710, can be recovered (*g*).

(3) Money paid at the express or implied request of the loser of a bet (not restricted to bets on games specified in the 1710 Act) to the winner cannot be recovered. It is caught by the Gaming Act, 1892 (*h*) (*i*).

(4) Money lent to the loser of a bet to enable him to pay betting losses already incurred is not within the Gaming Act, 1710; nor is it within the Gaming Act, 1845, and hence not within the Act of 1892. It may therefore be recovered (*k*).

(5) Where money has been lent to enable the borrower to bet or pay betting losses in respect of a game or matter which is illegal the contract of loan is tainted by the illegality attaching to the game or other matter and the money cannot be recovered (*l*). Securities for such loans are in the same case as securities for other illegal debts.

(*d*) Now declared in s. 30, Bills of Exchange Act, 1882; see, however, s. 36 (2).

(*e*) See p. 379, *ante*

(*f*) *Carlton Hall Club v. Lawrence*, [1929] 2 K. B. 153.

(*g*) *Saxby v. Fulton*, [1909] 2 K. B. 208, 232.

(*h*) See p. 378, *ante*

(*i*) *Saffery v. Mayer*, [1901] 1 K. B. 11; *Woolf v. Freeman*, [1937] 1 A. E. R. 178

(*k*) *Re O'Shea*, [1911] 2 K. B. 981.

(*l*) *Cannan v. Bryce* (1819), 3 B. & Ald. 179; 106 E. R. 628; *McKinnell v. Robinson* (1838), 3 M. & W. 484; 150 E. R. 1215.

PART IV

PERSONS AFFECTED BY THE OPERATION OF CONTRACT

At common law a contract upon its making can confer rights and impose obligations upon only a limited class of persons. The common law position is often stated, approximately, but not quite accurately, to be that a contract affects only those who are parties to it. Moreover, where a contract affects two or more as promisors or as promisees the question arises of how the contract so affects them—whether (in the case of co-promisors) jointly, severally, or jointly and severally, or (in the case of co-promisees) jointly or severally. The persons originally affected by the common law operation of a contract, the statutory modifications of the common law position, and where the persons so affected are co-promisors or co-promisees the manner in which they are affected, will be the first subject of our inquiry in this part.

Although the general common law position is approximately that a contract upon its making affects only those who are parties to it, that does not mean that the contract need as a physical fact be made by the parties. By the conception of agency the common law enables one man to make a contract the benefits and burdens of which will be enjoyed and borne by another. The common law principles as to agency in relation to contract have been very completely worked out, and we shall examine them in some detail.

Equity, like the common law, has developed a means whereby one man may enter into a contract and another *ab initio* take the benefits and burdens of it. Equity achieves this result by the employment of the trust. The party concerned enters into the contract as a trustee for the third person. Moreover equity, the Legislature, and, to a smaller extent, the common law have devised means whereby a party who has originally entered into a contract solely on his own account may thereafter to a greater or less extent allow a third party to take the benefits and burdens attaching to the former party's side of the contract. Equity has contributed to this development in two ways. In the first place it has allowed a party to a contract subsequently to its making to declare himself a trustee of it for a third person. Secondly, it has joined with the

common law and the Legislature in developing the technique of assignment, whereby the original party drops out of the contract altogether and the third person is substituted in his place. We shall also consider, therefore, the two uses of the trust to extend the range of persons affected by a contract, and the rules as to assignment.

CHAPTER XV

COMMON LAW RULES AND STATUTORY MODIFICATIONS THEREOF AS TO PERSONS AFFECTED BY ORIGINAL OPERATION OF CONTRACT

§ 137. Introductory. Persons Affected at Common Law by the Original Operation of a Contract

The persons affected by a contract are of two classes—those affected by the operation of the contract as originally made and those to whom its operation is afterwards extended by declaration of trust or assignment. The operation of a contract in affecting the former class of persons may be described as original. In this chapter we shall consider first, what persons are affected by the original operation of a contract at common law and the modifications of the common law position introduced by the Law of Property Act, 1925 (*a*); and secondly, where by the original operation of the contract two or more persons are bound or entitled to the same thing, how they may be so bound or entitled.

So far as the original operation of simple contracts is concerned the common law position may be stated quite shortly. The only persons upon whom such a contract can at common law originally confer rights or impose duties are those who are parties to the agreement constituting it (*b*).

In the case of contracts by deed, however, the matter is somewhat more technical. For the present purpose deeds are of two kinds, either expressed to be made between two or more

(*a*) S. 56 (1).

(*b*) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A. C. 847, 853; *Price v. Easton* (1833), 1 B. & Ad. 433; 110 E. R. 518; *Tweddle v. Atkinson* (1861), 1 B. & S. 393; 121 E. R. 762. See pp. 99, 100, *ante*.

persons named in the deed as parties, or not so expressed (c). A deed *inter partes* can at common law originally confer contractual rights upon only those persons who are expressly named as parties to it. It is not sufficient that a person should be indicated in the deed as a covenantee if he is not also named as a party (d). One not so named as a party, however, may nevertheless by executing the deed covenant with one who is named as a party (e). On the other hand, where a deed is not expressed to be made between parties these technicalities have no place and persons may acquire rights or incur obligations under such deeds if those persons are indicated with reasonable certainty (not necessarily by name (f)) as covenantors or covenantees (g). It need scarcely be added that generally a person cannot incur a liability as a covenantor unless he executes the deed. The exception is where a deed confers a benefit upon a person and also contains a covenant by him. In that case if he accepts the benefit then even although he has not executed the deed he will be liable under the covenant (h) (i).

Whether the contract is a simple contract or a deed the general rule of the common law is that only persons in existence at the time when the contract is made can be affected by its original operation (k). There is an exception to this rule in the case of contracts made in consideration of marriage. If such contracts purport to confer contractual benefits upon the issue of the marriage, such issue (who are said to be within the marriage consideration) may in proper season sue on the contract as though they had been in existence when it was made (l).

(c) As to whether this distinction corresponds with that between indentures and deeds *poll* see Norton, *Deeds* (2nd ed.), 27.

(d) *Berkeley v. Hardy* (1826), 5 B. & C. 355; 108 E. R. 132; *Lord Southampton v. Brown* (1827), 6 B. & C. 718; 108 E. R. 615. This rule is an archaic survival of the formalism of an earlier day, and is quite out of harmony with the modern view that the law of contract should so far as possible render legally effective the intentions of the parties declared with reasonable certainty.

(e) *Salter v. Kidgley* (1689), Carth. 77; 90 E. R. 648.

(f) *Sunderland Marine Insurance Co. v. Kearney* (1851), 16 Q. B. 925, 938; 117 E. R. 1136, 1141.

(g) *Scudamore v. Vanderstene* (1587), 2 Co. Inst. 673; *Cooker v. Child* (1673), 2 Lev. 74; 83 E. R. 456.

(h) *Naas v. Westminster Bank, Ltd.*, [1940] A. C. 366, 373.

(i) To the general principles above stated as to the common law operation of contracts it would seem that an exception is constituted by the rule whereby a subsisting contract by A with B not to enforce a claim which A has against C may afford a defence to C. See pp. 505 *et seq.*, *post*.

(k) *Kelsey v. Dodd* (1882), 52 L. J. Ch. 34, 39; pp. 403, 404, *post*.

(l) *Re D'Angibau* (1880), 15 Ch. D. 228, 242; *Pullan v. Koe*, [1913] 1 Ch. 9, 15; Maitland, *Equity* (2nd ed.), 72; Ashburner, *Equity* (2nd ed.), 383.

§ 138. S. 56 (1), Law of Property Act, 1925

Section 56 (1) of the Law of Property Act, 1925, is as follows: "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." Property is defined by the Act (m) to include, unless the context otherwise requires, "any thing in action, and any interest in real or personal property". The precise operation of section 56 (1) is a matter of some uncertainty. "I think many difficulties may well arise on that section which do not fall to me to-day to solve", remarked Simonds, J., in a recent case (n). It is clear, however, that the sub-section does not amount to a general reversal of the common law rules as to who may originally acquire rights under contracts, but (so far as those rules are concerned) at most merely introduces certain exceptions to them. It enables a person to acquire a contractual right contrary to the common law rules only where that right relates to "property" existing independently of the covenant or promise under which the right is claimed. Thus if A contracts with B to pay a sum of money to C the sub-section will not enable C to sue for the money (o). It has also been stated that the sub-section does not enable any person to claim a right under an instrument unless he is indicated in the instrument as one upon whom such a right is intended to be conferred (p). Finally, it may be observed that the sub-section applies only to "conveyances or other instruments" (q) (r).

§ 139. Two or More Persons Bound or Entitled to the Same Performance

A. Co-Promisors.

Two or more persons may be bound by the one contract to the same performance. In such a case they may be severally, jointly, or jointly and severally liable. They are severally liable where each makes a separate promise to the promisee in respect of the

(m) S. 205 (1) (xx).

(n) *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610, 624.

(o) *Re Sinclair's Life Policy*, [1938] 3 A. E. R. 124; *Re Foster*, [1938] 3 A. E. R. 357.

(p) *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610, 625; [1938] Ch. 351, 365.

(q) *Conveyance* and *instrument* are defined s. 205 (1) (ii) and (viii).

(r) Statutory relaxations of the common law rules are also to be found in the following statutes: s. 11, Married Women's Property Act, 1882; s. 14 (2), Marine Insurance Act, 1906; s. 47 (1), Law of Property Act, 1925; s. 36 (4), Road Traffic Act, 1930.

performance (s). They are jointly liable where they join in making the one promise. They are jointly and severally liable where they all join in the one promise and at the same time make separate promises in respect of the performance (t).

These three cases are alike to the extent that as in each of them the liability of the individual promisor relates to the same performance, performance by any one promisor discharges the others of liability to the promisee. They are also alike in that in each of them an individual promisor who has been called upon to render more than a proportionate part of the performance due to the promisee has (at any rate where the performance was the payment of money) a right of contribution against the other promisors (u). At common law the amount of contribution payable by each promisor was determined by reference to the total number of promisors originally liable to the promisee (x); but in equity the matter was determined by reference to the number of promisors who were liable to the promisee and solvent at the time when the promisor seeking contribution became entitled presently to recover it; and the equity rule now prevails (y).

In some other respects each of these forms of co-liability possesses its own characteristics and we proceed accordingly to notice the distinguishing features of each form of co-liability.

Several Co-Promisors. The liability of co-promisors severally bound in the one contract in respect of the same performance is, except in respect of the identity of performance and consequences resulting from this identity (*i.e.* discharge of all by the performance of any one and right of one paying more than his share to contribu-

(s) *Collins v. Prosser* (1823), 1 B. & C. 692; 107 E. R. 250; *Lee v. Nizon* (1834), 1 A. & E. 201; 110 E. R. 1183.

(t) *Ex p. Honey* (1871), L. R. 7 Ch. 178, 183, *per* Mellish, L.J.: "It appears to me that a joint and several promissory note, though it is one instrument, contains both a joint contract and distinct separate contracts by the several makers." See also *King v. Hoare* (1844), 13 M. & W. 494, 505; 153 E. R. 206, 210.

(u) *Holmes v. Williamson* (1817), 6 M. & S. 158; 105 E. R. 1202; *Collins v. Prosser* (1823), 1 B. & C. 682, 688; 107 E. R. 250, 252; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. The right to contribution may be displaced where the relationship between the co-promisors *inter se* would render it inappropriate. Thus although principal debtor and co-sureties are generally jointly and severally liable to the creditor, the right of contribution exists only as between the co-sureties. As against the debtor the sureties are entitled not merely to contribution but to a complete indemnity. *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401. Co-promisors may by contract vary or exclude the right to contribution. *Swain v. Wall* (1641), 1 Ch. R. 149; 21 E. R. 534.

(x) *Batard v. Hawes* (1853), 2 E. & B. 287; 118 E. R. 775.

(y) *Hitchman v. Stewart* (1855), 3 Drew. 271; 61 E. R. 907; *Lowe v. Dixon* (1885), 16 Q. B. D. 455.

tion), in all material respects the same as if they had entered into separate contracts dealing with different subject-matters.

Joint Promisors. Joint promisors make but one promise and they are parties to but one obligation. In general, therefore, anything which destroys the obligation in respect of one promisor destroys it in respect of all. Accordingly the release of one joint promisor operates to discharge the others (z). So if the creditor obtains judgment against one joint promisor the obligation is merged in the judgment and the creditor cannot thereafter sue the other promisors (a).

Where one of several joint promisors dies leaving others surviving him he and his estate are discharged from liability under the contract. In such a case, however, the principle indicated in the last preceding paragraph does not apply, and instead of the survivors being discharged, the entire legal liability under the joint contract devolves upon them (b). On the death of the only surviving promisor the obligation devolves at law upon his personal representative (c). In equity, however, the estate of a deceased promisor (who was not before his death the only surviving promisor) may in certain circumstances be treated as still liable notwithstanding the course of devolution of the legal liability, and the promisee admitted to rank as a creditor of the estate after the creditors to whom the deceased was severally liable. The chief application of this equitable principle of administration is in relation to the joint contractual obligations of partners (d).

Joint promisors are in general entitled to be sued together (e) and where a plaintiff has instituted his action against less than the full number of surviving joint promisors any promisor who is sued may apply to the Court for an order that the plaintiff shall join as a defendant any promisor not already made a defendant. Such an order will not be made, however, if in the opinion of the Court there are special circumstances which would render such a joinder undesirable, as, *e.g.*, where the promisor whose joinder as defendant

(z) *Duck v. Mayeu*, [1892] 2 Q. B. 511. As to a covenant not to sue one joint contractor, and a release of one reserving the right to sue the others, see p. 504, *post*.

(a) *Kendall v. Hamilton* (1879), 4 App. Cas. 504.

(b) *White v. Tyndall* (1888), 13 App. Cas. 263.

(c) *Calder v. Rutherford* (1822), 3 Brod. & Bing. 302; 129 E. R. 1301.

(d) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Re Hodgson* (1885), 31 Ch. D. 177.

(e) *Kendall v. Hamilton* (1879), 4 App. Cas. 504, 515-6, 522, 534-5, 544.

is sought is out of the jurisdiction and cannot be served with process (f).

Joint and Several Promisors. The liability of joint and several promisors exhibits a somewhat illogical combination of certain of the characteristics of joint liability and certain of those of several liability. As the liability of such a promisor is several he is not entitled to insist that his co-promisors be sued with him (g). So also his several liability is not discharged by the promisee taking judgment against another co-promisor (h). Nor, again, does the liability of a joint and several promisor devolve, upon his death, on the surviving promisors, but passes to his personal representative, who becomes jointly and severally liable with the surviving promisors (i). But a release of a joint and several promisor discharges his co-promisors to the same extent as if the case were one of a joint promise (k). So if a written contract is discharged by cancellation in favour of one joint and several promisor it is discharged in favour of all (l). Similarly if the promisee makes one of the joint and several promisors his executor, the other co-promisors are thereby discharged (m).

B. Co-Promisees.

Two or more persons may be entitled in virtue of the same contract to the same performance. They are jointly so entitled when one promise is made to all of them without any express or implied indication that they are to be entitled to separate interests in the performance of the promise. They are severally so entitled when, although one promise is made to all of them, an intention expressly or impliedly appears that each of them is to be entitled to a separate and distinct share in the performance. It appears that as a matter of law promisees cannot be jointly and severally entitled to the same performance (n).

(f) *Wilson Sons & Co. v. Balcarres, etc., Co.*, [1893] 1 Q. B. 422; *Robinson v. Geisel*, [1894] 2 Q. B. 685; *Norbury Natzio & Co. v. Griffiths*, [1918] 2 K. B. 369.

(g) *King v. Hoare* (1844), 13 M. & W. 494, 505; 153 E. R. 206.

(h) *Blyth v. Fladgate*, [1891] 1 Ch. 337, 353.

(i) *Tippins v. Coates* (1853), 12 Beav. 401; 52 E. R. 158.

(k) *Clayton v. Kinaston* (1699), 1 Ld. Raym. 419; 91 E. R. 1178; *Re E. W. A.*, [1901] 2 K. B. 642.

(l) *Seaton v. Henson* (1678), 2 Show. 28; 89 E. R. 772; *Collins v. Prosser* (1823), 1 B. & C. 682, 689; 107 E. R. 250, 253.

(m) *Cheetham v. Ward* (1797), 1 B. & P. 630; 126 E. R. 1102; *Jenkins v. Jenkins*, [1928] 2 K. B. 501.

(n) *Bradburne v. Botfield* (1845), 14 M. & W. 559, 573; 153 E. R. 597, 603. But see s. 81 (1) of the Law of Property Act, 1925, quoted below.

Joint Promisees. Inasmuch as a promise to two or more jointly is but one promise and produces but one obligation, the discharge of the obligation with respect to one promisee involves its discharge with respect to all the promisees. Thus payment to one co-promisee discharges the debtor in respect of all (o). So a release by one promisee is, in the absence of fraud, a discharge of the promisor in respect of all the promisees (p). Moreover, as a promise made to two or more jointly is not made to any of them severally, all surviving promisees must at common law be joined in any action on the promise (q). In the case of joint covenantees an exception to this rule has now been introduced by the Law of Property Act, 1925 (r), which provides that "A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly . . . where made after the commencement of this Act shall be construed as being also made with each of them". This provision is subject to any contrary intention expressed in the instrument (s). Upon the death of one of several joint promisees the right to sue on the promise devolves on the surviving promisee or promisees (t).

Several Co-Promisees. A promise to two or more persons severally places them in a situation analogous to that of tenants in common of an interest in land. Save that their rights arise out of the same promise each is in the position of a separate promisee (u). Moreover, as against the promisor each is separately entitled to his own proportion of the performance, so that, *e.g.*, if A owes £50 to X and Y severally, he does not, by paying £50 to X, discharge himself as against Y (w).

It is to be observed that while as against the promisor two or

(o) *Wallace v. Kelsall* (1840), 7 M. & W. 264; 151 E. R. 765; *Powell v. Brodhurst*, [1901] 2 Ch. 164.

(p) *Jones v. Herbert* (1817), 7 Taunt. 421; 129 E. R. 168. As to whether disclaimer by one of a number of joint covenantees will discharge the covenant as against the others see *Wetherell v. Langston* (1847), 1 Ex. 634; 154 E. R. 269.

(q) *Petrie v. Bury* (1824), 3 B. & C. 353; 107 E. R. 764. If a promisee will not, after tender of an indemnity for costs, join as a co-plaintiff, he may be added as a defendant. *Cullen v. Knowles*, [1898] 2 Q. B. 380; *Rodriguez v. Speyer Bros*, [1919] A. C. 59, 69, 103-4, 142.

(r) S. 81 (1).

(s) *Ib.* sub-s. (3).

(t) *Anderson v. Martindale* (1801), 1 East 497; 102 E. R. 191. As to joint covenantees see s. 81, Law of Property Act, 1925.

(u) Prior to the Judicature Act, 1873, it seems that ownership in common of a chose in action was possible only in equity. *Re McKerrell*, [1912] 2 Ch. 648, 653. See Halsbury, Laws of England (2nd ed.), vol. 25, p. 212.

(w) *Steeds v. Steeds* (1889), 22 Q. B. D. 537; see also *Beer v. Beer* (1852), 12 C. B. 60; 138 E. R. 823.

express meaning of the contract (f). In one case where a promise is made to co-promisees without words of severance, namely where the promise is to repay money lent, the promisees are, despite the form of the promise, *prima facie* entitled severally, and to rebut this presumption as between the promisor and the promisees there must be an express statement to the contrary (g).

(f) *Foley v. Addenbrooke* (1843), 4 Q. B. 197; 114 E. R. 872; *Sorsbie v. Park* (1843), 12 M. & W. 146; 152 E. R. 1146; *Hopkinson v. Lee* (1845), 6 Q. B. 964; 115 E. R. 363; *Bradburne v. Botfield* (1845), 14 M. & W. 559; 153 E. R. 597; *Palmer v. Mallet* (1887), 36 Ch. D. 411. See also *White v. Tyndall*, *supra*.

(g) *Steeds v. Steeds* (1889), 22 Q. B. D. 537; *Powell v. Brodhurst*, [1901] 2 Ch. 160.

CHAPTER XVI

AGENCY

§ 140. The Nature of Agency

The legal power and authority of any person to make a contract or do any other act in law, may in general be exercised by him in either of two ways. It may be exercised either *in propria persona*, or by the agency, instrumentality, or intermediation of some other person who represents him for this purpose, and whose contract or other act is deemed by the law to be that of the person so represented, and has the same effect as if he had acted personally. This principle is expressed in the legal maxim, *Qui facit per alium, facit per se*—he who does an act by the instrumentality of another person is deemed in law to have done it himself. This rule is not, indeed, invariable, for there are certain acts in law which are of such a nature that the law does not permit any such delegation of authority, but requires the act to be done personally by the very person who has power to do it and whose act it is (a). Marriage is an agreement which must be made *in propria persona*. Similarly, powers and authorities which are themselves merely delegated cannot commonly be further delegated to a third person, the general principle in this respect being expressed in the maxim, *Delegatus non potest delegare*. Even within the domain of contract itself there are certain kinds of contracts which must be made personally and not by the exercise of delegated authority by another person. There are, for example, cases in which a statute requires a contract to be made in writing signed by the contracting party himself, and in such a case it is necessary, therefore, that he should contract *in propria persona* (b). Such cases, however, are quite exceptional, and the almost invariable rule is that a contract may be made either personally by the contracting party, or by some other person duly authorised to represent him and to enter into the contract on his behalf.

The person who is so authorised by law to represent and act for another person in making a contract or in doing any other act in law, is called the *agent* of that person. The person so

(a) *Bevan v. Webb*, [1901] 2 Ch. 59, *per* Stirling, L.J., 77

(b) *E.g.*, s. 6, Moneylenders Act, 1927.

represented by him and for whom he so acts is called his principal. Specifically, and in respect of particular classes of cases, an agent is also known by such various titles as attorney, representative, delegate, or proxy. The relationship so existing between a principal and his agent is known as *agency*.

The doctrine of agency is not limited to the law of contract, for it extends in general to the entire scope of acts in law of every description. A principal may authorise an agent to execute a deed of conveyance, or to make a grant, or to bring an action at law, or to rescind a contract, or to exercise a power of re-entry, or to do any other act involving legal results upon his rights and liabilities, no less than to make a contract on his behalf. We are here concerned, however, solely with contractual agency—the authority of one person to enter into a contract on behalf of another.

Such agency involves a threefold relation between the parties concerned. It involves in the first place a legal relation between the principal and his agent, in the second place a legal relation between the principal and the person with whom he contracts through the instrumentality of the agent, and in the third place a legal relation between the agent himself and the person with whom he so contracts on behalf of his principal. Unfortunately, there is no recognised legal designation of a person who so contracts through an agent with a principal. In default of a better term we shall call him the *third person*.

By reference to the threefold relationship thus constituted the entire law of contractual agency is divisible into three parts. It deals first with the rights and obligations existing between the principal and his agent, in the second place with those existing between the third person and the principal, and finally with those existing between the third person and the agent. With the first of these three parts of the law of agency we do not propose to deal. It does not relate to the general principles of the law of contract. It relates, on the contrary, to the special relationship (which may be contractual) (c) constituted between the principal and the agent by the agreement of employment under which the agent is appointed. Although, however, agency may in this aspect be a particular kind of contract, like the sale of goods, partnership, guarantee, or insurance, we are here no more concerned with it in this aspect than we are concerned with the special principles which

(c) "Let us first put away the notion that agency itself is a contract. It is a relation, and though this relation may result from contract, and though contractual rights often flow from it, agency does not necessarily originate in contract": Street, *Foundations of Legal Liability*, vol. 2, 432. See also p. 396, *post*.

govern the relation between a vendor and a purchaser of goods. We shall leave out of account, therefore, the contract of agency as a particular kind of the contract of employment, and as creating, like any other contract, special rights and obligations between the parties to it. Nor shall we consider the rights and duties constituted between principal and agent where the relationship is non-contractual. We are here concerned with agency not in its aspect as a relationship or contract between principal and agent imposing and conferring rights and obligations between the parties, but in its aspect as a grant by the principal to his agent of authority to represent him in the exercise of his power of making contracts with third persons. The relationship, whether contractual or not, between principal and agent which is accessory to this grant of authority, and which determines the obligations existing between principal and agent in respect of the exercise of the authority so conferred, lies outside the scope of a treatise on the general principles of the law of contract. But it is otherwise with the relations between the third person and the principal and agent. These pertain to the law of contract in general. We propose to deal accordingly with the law as to contracts made by an agent, but not with the relationship of agency itself.

§ 141. Agent Distinguished from (1) Representative; or
(2) Servant; or (3) Trustee

An agent may be defined as a person who is legally authorised to exercise on behalf of another person, called his principal, any power possessed by that other person of entering into a contract or doing any other act in law. Unfortunately, the terms principal and agent are commonly used also in a wider and less determinate sense. A person acting for and on behalf of another person is often called his agent although he has no power to bind him by any contract or other act in law made or done on his behalf (*d*). Thus the owner of land may employ an estate agent to find a purchaser for him, and even though the person so employed has no authority entrusted to him to enter into a contract of sale, but is engaged merely to negotiate with intending purchasers and to submit their proposals to his employer, he is nevertheless spoken of in popular language as the agent of that employer (*e*). So a merchant in the

(*d*) *Ex p. White, Re Nevill* (1871), L. R. 6 Ch. 397, *per James, L.J.*, 399, (decision affirmed by House of Lords *sub nom. Towle & Co. v. White and others*, 39 L. T. 78); *Kennedy v. De Trafford*, [1897] A. C. 177, *per Lord Herschell*, 188.

(*e*) See *Thuman v. Best* (1907), 97 L. T. 239; *Keen v. Mear*, [1920] 2 Ch. 574; *Leacock v. Bromley* (1920), 127 L. T. 116.

colonies may employ a commission agent in England to purchase goods for him. Such a commission agent, although he is thus employed to buy the goods for his employer, may not be authorised to buy them in his employer's name so as to create any contractual relation between the English manufacturer and the colonial merchant. In such a case the contract of sale and purchase is made exclusively between the manufacturer as seller and the commission agent as buyer. Yet such a buyer so purchasing on account of a foreign employer is commonly spoken of as the agent of that employer (f). It is difficult, perhaps impossible, to frame any accurate definition of an agent in this vague and popular sense. We cannot say generally that an agent is a person employed to act in any manner on behalf or instead of his employer, for such a definition is far too wide. A man may employ another to dig his garden or to clean his boots for him, but the person so engaged to act for him cannot be called his agent in any intelligible sense. Perhaps it may be said that an agent in the generic and popular sense is a person employed by another person to represent and act for him in respect of *third persons*. An agent in this sense is an *intermediary*, standing between his principal and third persons, and entrusted with his employer's business in respect of those persons. But an employee whose business is with his employer alone, and not with third persons, is not an agent. In considering the law of agency it is necessary to bear in mind this distinction between an agent *stricto sensu* and an employee who is called an agent in this generic sense by way of analogy—between an agent properly so called and a quasi-agent. We shall use the term agent in its strict sense as meaning in the law of contract a person who is authorised so to deal with third persons on account of his principal as to constitute contracts between those third persons and his principal: a person who is empowered to establish, in the technical language of the law, *privity of contract*—a contractual relationship—between his principal and some third person.

An agent must be distinguished from a servant. Many servants are also their master's agents; but a man may be a servant without being an agent, or an agent without being a servant. A servant is an employee engaged and acting on such terms that he is subject to his master's orders, directions, and control in respect not merely of that which he is employed to do, but also in respect of the manner in which he does it. Employees who are not servants are

(f) See p 413, *post*.

distinguished as independent contractors. They are engaged to perform certain services for their employer, but possess independent authority and discretion as to the manner in which they shall perform those services. They have contracted to do certain work for their employer, but they have not contracted to obey his orders in respect of the manner in which they shall perform their contract. In this respect they are their own masters. A shop-assistant, or a seaman, or a clerk, is a servant, but a solicitor, or an auctioneer, or the driver of a hired conveyance is an independent contractor (g). The distinction is of special importance in the law of torts rather than in that of contracts by reason of the rule that an employer is responsible in damages for all acts of negligence or other civil injury done by his servants in the course of their employment, even though they had no authority so to act, whereas an employer is not responsible for the wrongful acts of independent contractors unless he actually authorised them (h).

An agent may be either a servant as so defined or an independent contractor. A shop-assistant employed to sell his master's goods is both his servant and his agent. An auctioneer is his employer's agent, but not his servant. On the other hand, an employee may be a servant or an independent contractor without being in any respect an agent of his employer, having no authority to establish privity of contract between his employer and third persons or to bind him by any other act in law done on his behalf.

An agent must be further distinguished from a trustee. Agents and trustees are alike in this respect: that they both act and exercise their functions and authorities on behalf and in the interests of other persons. Both in a certain sense represent and stand in the place of other persons, those others being called principals in the case of agency and beneficiaries in the case of trusts. The essential difference between a trustee and an agent is that a trustee exercises powers which in the eye of the law (i) are his own, whereas an agent exercises by way of delegation powers which are in law those of his principal. Thus property may be managed on behalf of a person either by his agent or by his trustee. In appearance and, indeed, in substance, so far as the mere fact of the matter is concerned, these two situations may often be identical. But in law the difference is essential. The

(g) See Salmond, *Torts* (10th ed.), 83-84.

(h) *Ib.*

(i) Law is not used in this paragraph by way of contrast with equity but as meaning the law as a whole.

property is vested in the trustee, but it is not vested in the agent. The trustee, therefore, in managing or disposing of the property is exercising his own powers as the owner of it, even though he is bound to exercise them in the interests of his beneficiary. But the agent in doing the very same thing is dealing not with his own property, but with that of the person on whose behalf he acts, and he is exercising, therefore, not any powers of his own, but powers belonging to his principal and delegated by the principal to his agent. The acts of an agent, therefore, are in law the acts of his principal; but the acts of the trustee are his own, and are not attributed to his beneficiary. When an agent makes a contract on behalf of his principal he thereby creates privity of contract between his principal and the third party. But when a trustee does the same the general rule is that the contract is his alone, and no such privity of contract is constituted. How far exceptions to this general rule have been developed will be considered in the next chapter.

§ 142. Agency by the Authority of Principal and by the Authority of Law.

Agents are of two kinds in respect of the source from which they derive their authority to represent and act for their principals. Ordinarily they derive this authority from the principal himself by way of grant. Such a grant is called an appointment. When it is made by deed it is specifically called a *power of attorney*. As accessory to and combined with such an authority there is commonly a contract between the principal and agent setting out the terms of the employment to which the powers so granted are incidental. The appointment of an agent, however, is essentially a grant, not a contract.

In other and exceptional cases the authority of an agent has its source not in a grant from his principal, but in the act of the law itself. In such cases the relation of agency arises not *ex consensu* but *ex lege*. For special reasons the law authorises one man to exercise the legal powers of another, apart altogether from any consensual delegation of those powers by him to whom they belong. Thus the committee of a lunatic is his agent to exercise on his behalf and in his name those powers which he is unable to exercise for himself and which the law thus permits to be exercised by the committee in his place. So a wife deserted by her husband is regarded by the law as his agent for the purpose of enabling her

to contract in his name for the necessities of her existence (*k*). This is the so-called agency of necessity, constituted not by any consensual delegation to her of her husband's authority, but by the grant of the law itself (*l*). So a body corporate, being merely a *persona ficta*, and unable to make any contracts or do any other acts in law *in propria persona*, or even to delegate its legal powers to agents or representatives by any actual grant, is necessarily represented for this purpose by living persons who are appointed and recognised by the law itself as the authorised representatives and agents of the body corporate (*m*). Their acts and contracts are in law the acts and contracts of the corporation, just as if those representatives had obtained their authority by way of grant from this *persona ficta* itself. We shall, however, leave out of account those exceptional cases of agency arising *ex lege*, for they pertain to special matters outside the scope of the general theory of contract. We shall deal exclusively with agency having its normal source in a grant of delegated authority from the principal.

The appointment of an agent may in general be made either by deed, or by a writing other than a deed, or orally, or even tacitly by the conduct of the principal. A husband, for example, tacitly appoints his wife as his agent within the scope of ordinary household affairs and accounts by allowing her to act as his housekeeper (*n*). In certain cases, however, a formal appointment is required. At common law an agent to execute a deed must himself be appointed by deed, such an appointment being known as a power of attorney (*o*). In certain cases by statute an agent must be appointed in writing. There is, however, no general rule that an agent to make a contract in writing must be appointed in writing,

(*k*) *Bazeley v. Forder* (1868), L. R. 3 Q. B. 559. Generally as to agency of necessity as between husband and wife see 2 Sm. L. C. (13th ed.), pp. 461 ff.

(*l*) As to the nature and extent of the general doctrine of agency of necessity see *Prager v. Blatspiel, Stamp & Heacock, Ltd.*, [1924] 1 K. B. 566, and *Jebara v. Ottoman Bank*, [1927] 2 K. B. 254.

(*m*) *Ferguson v. Wilson* (1866), L. R. 2 Ch. 77, *per* Cairns, L.J., 89; *Peat v. Gresham Trust, Ltd.*, [1934] A. C. 252, *per* Lord Tomlin 261. Cf. Pollock, *Contract* (11th ed.), 96.

(*n*) The appointment in such a case arises not from the relationship of husband and wife (*Manby v. Scott* (1659), 1 Sid. 109; 82 E. R. 1000, 2 Sm. L. C. (13th ed.), 421, 436), but from the fact of the wife being permitted to act as housekeeper. Accordingly where a man cohabits with a woman who is not his wife she may nevertheless enjoy the same authority as if she were his wife to pledge his credit within the scope of ordinary household affairs: *Ryan v. Sams* (1848), 12 Q. B. 460; 116 E. R. 940. Generally as to such agency see the judgment of McCordie, J., in *Miss Gray, Ltd. v. Cathcart* (1922), 38 T. L. R. 562, and 2 Sm. L. C. (13th ed.), 457—462.

(*o*) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, *per* Bowen, L.J., 563.

even though the contract itself requires to be in writing. An agent appointed orally or tacitly may make and sign contracts required by the Statute of Frauds to be made or evidenced by writing (p).

§ 143. Contractual Capacity

Speaking generally, capacity to contract personally is co-extensive with capacity to contract through an agent. In general, whosoever is capable of making any contract for himself is capable of making the same contract by an agent, and no person who is incapable of contracting personally is capable of doing so by an agent on his behalf. But the converse proposition is not true. Capacity to contract as an agent is not limited by those rules which determine capacity to contract personally. Any person of sufficient mental capacity is competent to enter into contracts as an agent on behalf of a principal, even though such agent is incapable of making contracts to bind himself. A minor of sufficient mental capacity, for example, may bind his principal by contracts made on his behalf, and so also could a married woman under the old law which deprived her of contractual capacity.

It is noteworthy that the law permits one and the same person to act as agent for both parties to the contract made by that agent. A broker, for example, may at the same time and in respect of the same contract be agent both for the buyer and seller. In his capacity as agent for the seller he sells the goods or shares to the buyer, and in his capacity as agent for the buyer he purchases them from the seller. In respect of this double agency he is regarded as possessed of a double legal personality, by virtue of which he does in a sense make an effective contract with himself (q).

§ 144. The Scope of an Agent's Authority—Express, Implied, or Apparent

A contract made by an agent in excess of the authority committed to him—a contract which is *ultra vires*—is in itself void and inoperative as regards his principal. Subject only to the effect of subsequent ratification, it imposes no obligations upon the principal

(p) *Coles v. Trecothick* (1804), 9 Ves. 234; 32 E. R. 592, *per* Lord Eldon, 250, E. R. 598; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, *per* Lord Redesdale, 31. See p. 180, *ante*.

(q) *Shee v. Clarkson* (1810), 12 East 507; 104 E. R. 199; *Empress Assurance Corporation v. Bowring* (1905), 11 Com. Cas. 107; *Glasgow Assurance Corporation v. Symondson* (1911), 104 L. T. 254.

and confers no rights upon him. Its effect, if any, upon the rights and liabilities of the agent himself will be considered later.

For the purpose of this rule as to *ultra vires* contracts the authority of an agent is of three kinds, being (1) *express*, or (2) *implied*, or (3) *apparent*. Each of these kinds of authority is sufficient to support the contract so as to make it binding on the principal. Express authority is that which is conferred by the express terms of the appointment. A power of attorney, for example, commonly contains express and detailed provisions, setting out in so many words the precise scope of the grant of authority so made to the agent. The authority of an agent, however, is not commonly limited to the express terms of his appointment. Just as the express terms of a contract are commonly supplemented by implied terms read into the contract by the law itself by way of implication based on the constructive intention of the parties, so the express authority conferred upon an agent by the terms of his appointment is commonly supplemented by further implied authority conferred by the law itself. When a principal appoints an agent, he does not commonly set out at length and in express words the entire scope of his authority, any more than when men make a contract of sale they set out in words the entirety of the obligations and conditions which are thereby created between the parties. In both cases the law is ready and willing to supply the deficiencies of the expressed intention by filling up the skeleton of the express terms with further terms that are implied. As in the case of contracts so in the case of agency, the law is enabled to do this effectively by reason of the fact that most appointments of agency fall within recognised types or classes already familiar to the law. The principal appoints a person as his solicitor, or as his auctioneer, or as his broker, or as the manager of his shop. The law knows the nature of the relationship so intended, and adds to the express terms of the appointment all those implied terms which are necessary to make the relation so constituted between the parties complete and workable (r). In particular, in the case of agency, as in that of contract, the law will read into the appointment, as implied terms thereof, all mercantile and other usages which, in accordance with established practice, apply to a relationship of that type (s). The supplementary authority so conferred by the law by way of addition to

(r) *Bayley v. Walling* (1849), 7 C. B. 886; 137 E. R. 351.

(s) *Bayly v. Butterworth* (1847), 1 Exch. 425; 151 E. R. 181. Cf. *Sweeting v. Pearce* (1861), 9 C. B. (N.S.) 535; 142 E. R. 210, and *Robinson v. Molloy* (1875), L. R. 7 H. L. 802.

the express authority conferred by the principal constitutes the implied authority of the agent. Save in the case of formal appointments such as powers of attorney, the larger part of the authority of most agents is thus implied rather than express. The law knows for itself the implied nature and scope of the authority of a broker, or a solicitor, or a factor, or an auctioneer, so far as the principal has not seen fit to limit or increase it by the express terms of the appointment, and it is not necessary, therefore, for the principal, in making the appointment, to express for himself that which the law is ready to imply.

An agent, in addition to his express or implied authority, may also possess *apparent* authority, which is good enough for the purpose of rendering binding on the principal a contract made pursuant to it. A principal may so act as to confer upon his agent an ostensible authority in excess of any real authority conferred upon him either by the express terms of his appointment or by implication of law. That is to say, he may put his agent in such a position that he appears to third persons to possess an authority which he does not possess in truth. In such a case the principal is estopped from alleging that the agent's apparent authority was not his real authority as against third persons who have dealt with him in reliance on that which he so appeared to possess. This is simply an illustration of the general principle of estoppel by representation. Having misled third persons by his express or implied representations that the agent possesses a certain authority, the principal is not permitted to prove that the representation is not correct to the prejudice of persons who have acted on the faith of it (*t*). Thus a principal cannot by private instructions given to his agent so restrict the implied authority conferred by law on agents of that class as to invalidate a contract made by his agent in breach of those instructions but within the limit of the implied authority so conferred by law, if the contract was made with a third person who had no notice of those private instructions (*u*). The agent, though he

(*t*) The distinction between implied and apparent authority is material as between the agent and his principal rather than as between the principal and the third party. Whether the authority be implied or merely apparent the principal will be bound to the third party (provided, in the case of a merely apparent authority, that the third party did not know that there was no real authority). But as between principal and agent, if the authority is merely apparent, the agent will have been guilty of acting beyond the scope of his mandate and will be liable accordingly; if, on the other hand, he had implied authority, that means that his acts were valid not only as between his principal and the third party but also as between the principal and the agent himself.

(*u*) *Pickering v. Busk* (1812), 15 East 38; 104 E. R. 758; *Coles v. Bristowe* (1868), L. R. 4 Ch. 3, 14.

had no real authority to make the contract, had apparent authority, and the principal is bound accordingly. Thus, if the manager of a mining company orders on credit goods which are necessary for working the mine, the company is liable for the price, notwithstanding the fact that the manager had received instructions that all goods were to be bought for cash (*x*). So a horse-dealer is bound by a warranty given by his agent on the sale of a horse, even if given in breach of the express instructions of his principal, if the buyer had no knowledge of those instructions (*y*).

In *Watteau v. Fenwick* (*z*) this principle was extended to a case in which the third person dealt with the agent without knowing that he was an agent and believed him to be a principal. The manager and licensee of a public-house, having apparent authority to purchase goods requisite for the conduct of the business, bought cigars in breach of instructions given to him by his principal, the owner of the house. The vendors believed that the person with whom they dealt was the real owner and principal. It was held that the vendors could recover the price of the cigars from the principal. It is difficult, however, to understand the ground of this decision (*a*).

§ 145. Ratification

When any person professing (*b*) to act as the agent of another makes on his behalf a contract which is *ultra vires*, either because the person who so made it was not an agent at all or because he exceeded his real or apparent authority, the contract is wholly invalid as between the principal and the third party, and neither confers rights nor imposes obligations on either of them. Nevertheless the principal may, if he chooses, subsequently adopt and confirm the unauthorised act of him who purported to act as his agent. In so doing he is said to *ratify* the contract. The effect of such ratification is to validate it *ab initio*, just as if it had originally been made with due authority. Ratification takes effect, not prospectively from its date, but retrospectively as from the date of the ratified contract. The legal maxim is *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*. In other words, the

(*x*) *Hawken v. Bourne* (1841), 8 M. & W. 703; 151 E. R. 1223

(*y*) *Howard v. Sheward* (1866), L. R. 2 C. P. 148.

(*z*) [1893] 1 Q. B. 346.

(*a*) See Lindley, *Law of Partnership* (10th ed.), 174, n. (*g*).

(*b*) A forger, merely by forging another person's name, does not profess to be acting as that person's agent, and that person cannot ratify the forgery: *Greenwood v. Martins Bank, Ltd.*, [1932] 1 K. B. 371, 378-9, 385; [1932] A. C. 51, 57.

consent of a principal to the act of his agent may be either precedent or subsequent. He may either consent beforehand to what his agent may do in his name, or he may consent afterwards to what his agent has already done in his name. The doctrine of ratification is not limited to contracts, but extends to all acts in law that are done by a professed agent without precedent authority. It exists even within the domain of torts and civil injuries; so that if a wrongful act is done by one man in the name and on behalf of another, though without his precedent authority, the other may subsequently so adopt and ratify the act as to make himself civilly responsible therefor, just as if he had done it himself. "That an act done, *for another*, by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law" (c).

In order that the ratification of an *ultra vires* contract should be thus operative, the following conditions must be fulfilled.

(1) Disclosure of Principal.

In the first place, it is to be observed that the only person who can ratify a contract is the principal on whose behalf the agent expressly professed to act at the time when it was made. If the person who makes the contract professes to make it on his own account, and not as the agent of any other person, it cannot be subsequently ratified by another person, even though in fact the agent intended to contract on his behalf. Such an intention must be expressed and manifested at the time when the contract was made, otherwise it cannot serve as the ground of subsequent ratification. This rule was established by the decision of the House of Lords in *Keighley, Maister & Co. v. Durant (d)*, reversing the decision of the Court of Appeal to the contrary. The Court of Appeal had extended and applied to the case of ratification the anomalous but well-established rule that a contract may be duly constituted between a principal and a third person, even though the agent (acting within the scope of his precedent authority) contracts in his own name without disclosing the existence of any principal. The House of Lords decided that this principle has no application to the subsequent ratification of an *ultra vires* contract.

(c) *Wilson v. Tumman* (1843), 6 Man. & G. 236, 242, *per Tindal*, C.J.; 134 E. R. 879, 882.

(d) [1901] A. C. 240

contracts, for example, whereby an existing business is purchased for and on behalf of a company about to be formed. Such a contract, though expressly made by an agent professing to act for the future company, does not bind the company as soon as incorporated, because a company not yet formed could not have authorised an agent to contract on its behalf. Nor can such a contract be ratified by the company after its incorporation, because at the time when the contract was made the company was not in existence and therefore possessed no contractual capacity (f).

If the company, when actually incorporated, is to become a party to any such contract, this can be effected at common law only by the device of making the contract over again between the company itself and the third person. The making of such a new and substituted contract is an essentially different thing from the ratification of the original contract. The substitution of a new contract (*novatio*) involves the bilateral consent of both parties based on good consideration. But ratification requires merely the unilateral assent of the ratifying party, and consideration is unnecessary (g).

(3) Contractual Capacity of Principal at Time of Ratification.

In the third place, a contract is no longer capable of ratification if by reason of change of circumstances it is no longer possible for the ratifying principal now to make such a contract himself. Thus an *ultra vires* contract of fire insurance cannot be ratified by the assured after the property has been destroyed by fire and he is aware of the fact (h). The contract of marine insurance, however, is an anomalous exception to this rule. Such a contract may relate to a ship or cargo lost or not lost at the date of the contract, and it has been held accordingly that it may be ratified even after the assured has become aware of the loss (i). The general doctrine is further illustrated by the rule that the unauthorised exercise of an option cannot be ratified after the option has expired by lapse of time (k). So an unauthorised exercise of an option can only be ratified within the time for which the option was given (l), and a

(f) *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Natal Land Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120.

(g) As to whether the position would be different if the contract were made between the third party and a trustee for the company see pp. 438 *et seq.*, *post*.

(h) *Grover v. Mathews*, [1910] 2 K. B. 401.

(i) *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757; Marine Insurance Act, 1906, s. 86.

(k) *Dibbins v. Dibbins*, [1896] 2 Ch. 348.

(l) *Dibbins v. Dibbins*, [1896] 2 Ch. 348.

stoppage *in transitu* cannot be ratified after the transit has ended (*m*).

(4) Reasonable Time after Contract.

In the fourth place, a contract can only be ratified within a reasonable time after the making thereof. What time is reasonable is a question of fact to be determined by reference to the nature of the contract and the circumstances of the case (*n*). The rule is analogous to the rule that an offer must be accepted within a reasonable time, and lapses if not so accepted.

(5) With Full Knowledge on Part of Principal.

In the fifth place, no words or acts of apparent confirmation or adoption amount to ratification unless the ratifying principal then possesses full knowledge of the existence and nature of the *ultra vires* contract so made on his behalf—save only in those cases in which he intends to ratify the transaction in any event, and waives the requirement of full knowledge of its nature (*o*).

(6) Ratification by Deed of Contract by Deed.

In the sixth place, it seems that a contract by deed can only be ratified by a deed (*p*). A contract in writing, but not being a deed, can, however, be ratified orally; and this is so, even though the contract requires to be made or evidenced in writing, if precedent authority to make it does not also require to be in writing (*q*). Authority subsequent may ordinarily be given in the same manner as authority precedent.

Pending ratification, what is the position of the third person with whom the *ultra vires* contract has been made? Is he in any manner bound by the contract, so that he must await the possibility of its subsequent ratification; or is he entitled, before it has been ratified, to repudiate it as *ultra vires* and invalid, so that ratification becomes thereafter impossible? This important question was considered and determined by the Court of Appeal in *Bolton v. Lambert* (*r*). It was there held that repudiation was impossible, and that an *ultra vires* contract had been effectively and retrospectively ratified and

(*m*) *Bird v. Brown* (1850), 4 Exch. 786; 154 E. R. 1433.

(*n*) *Re Portuguese Copper Mines* (1890), 45 Ch. D. 16.

(*o*) *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43, per Willes, J.; *Marsh v. Joseph*, [1897] 1 Ch. 213, 238.

(*p*) *Hunter v. Parker* (1840), 7 M. & W. 322; 151 E. R. 789.

(*q*) *Soames v. Spencer* (1822), 1 D. & R. 32.

(*r*) (1888), 41 Ch. D. 295.

confirmed so as to bind the third person, although he had repudiated it before the date of ratification. This decision, however, has been the subject of considerable criticism, and its authority is doubtful (s).

§ 146. The Operation of Contracts Made by an Agent

Having now considered the general nature of contractual agency and the manner in which it is constituted we proceed in the next place to deal with the legal effect of contracts so made by one person through the agency and intermediation of another. In ordinary cases there is no difficulty or complexity in this matter. In general a contract made through an agent has exactly the same legal operation as one which is made *in propria persona*. The agent is merely an intermediary through whose instrumentality the *vinculum juris* of a contractual obligation has been constituted between the principal and the third person, and when so constituted it has the same effect as if it had resulted from the direct act of the parties themselves. The agent, so soon as the contract is made, disappears from the transaction, and is no longer concerned with it.

This, however, is far from being invariably the case, for there are at least two other possibilities in the matter. In the first place, the agent, although duly authorised to constitute a contract between his principal and the third person, may not in fact do so, but may, on the contrary, constitute one between the third person and himself. Although acting on behalf and in the interests of his principal he has made himself the party to the contract instead of his principal. The resulting *vinculum juris* exists exclusively between himself and the third person, and he has not established any privity of contract between that person and the principal. In such a case the principal obtains the benefit and bears the burden of the contract not directly as being a party thereto, but indirectly through the fiduciary obligation of the agent towards the principal arising out of the nature of the relationship.

And there is a second and more complicated alternative. The

(s) Fry, *Specific Performance* (6th ed.), Note A, p. 733, *Fleming v. Bank of New Zealand*, [1900] A. C. 577; *Re Portuguese Copper Mines* (1890), 45 Ch. D. 16, 22, *per North, J.*: "I am glad to have such an authority to guide me; for I am afraid I should have gone wrong if I had not had the assistance of that decision"; *Davison v. Vickery's Motors, Ltd.* (1925), 37 C. L. R., at pp. 14 ff., *per Isaacs, J.* Cf. *Mayor of Kidderminster v. Hardwick* (1873), L. R. 9 Ex. 18. In *Watson v. Davies*, [1931] 1 Ch 455, Maugham, J. (as he then was), held that *Bolton v. Lambert* had no application where an offer is accepted by an agent subject to ratification by his principal. In such a case, as Maugham, J., said (p. 468), "there is in truth no contract or contractual relation until the approval [of the principal] has been obtained. The agent has incurred no responsibility".

agent may so exercise his authority as to constitute a contract not exclusively between his principal and the third person, nor exclusively between himself and the third person, but in both of these ways at once. He may create a double *vinculum juris* under which the third person is entitled to treat either the principal or the agent as being the other party to the contract, and under which either the principal or the agent may sue, or be sued by, the third person upon the contract. The situation so recognised by the law as possible and permissible is anomalous in its character and creates a great part of the difficulty and complexity of the law of contractual agency.

The most convenient method of dealing with this difficult matter is to divide it into two branches for special consideration. The first of these concerns the relation between the principal and the third person, while the second concerns the relation between the agent and the third person. The question to be asked and answered in the first case is: In what cases can the principal sue, and be sued by, the third person? The question in the second case is: In what cases can the agent sue, or be sued by, the third person? The answers to these questions will show that the rights and liabilities of the principal on the one hand and of his agent on the other are not necessarily alternative, but are sometimes concurrent. The third party may not be limited to recourse against the one party or the other, but may have recourse against both. And, similarly, both the principal and his agent may be entitled to enforce the contract against the third person. There are, therefore, further questions to be asked and answered as to the method in which the law reconciles these apparently conflicting effects of one and the same contract.

§ 147. The Relation Between the Principal and the Third Person

There are three distinct ways in which an agent may make a contract on behalf of his principal. In the first place he may, and normally does, contract in his principal's name; that is to say, he may expressly enter into the contract as the agent for a named or otherwise identified principal. In the second place, the agent may contract in his own name without disclosing the existence of any principal on whose behalf he is acting. In terms and appearance such a contract is one exclusively between the agent and the third person, but in fact it has been made on behalf of an undisclosed principal with due precedent authority received from him. The

third case is intermediate between these two. The agent may expressly contract in his capacity as an agent, and not ostensibly on his own account, and yet he may not disclose the name or identity of his principal. The contract is made expressly on behalf of a principal whose existence is disclosed, but whose identity is concealed. Such a contract is made neither in the name of the principal nor in that of the agent, but is anonymous. Such contracts are common in commercial practice, because of business considerations which render disclosure of the identity of the agent's principal inadvisable.

Now, in all these three cases the general rule as to the position of the principal is the same. In general every principal can sue the third person, and be sued by him, on a contract made with due precedent authority by the agent, irrespective of whether it is made in the name of the principal, or in that of the agent, or anonymously (t).

This is so whether the contract is made orally or in writing. Even though an agent makes a contract in writing in his own name so that on the face of the instrument he himself appears to be contracting personally with the third person, there being no disclosure of the existence or identity of a principal, nevertheless extrinsic evidence is admissible to prove that he was in reality an agent contracting on behalf of a principal, and to prove who that principal is. And such evidence is admissible both for the purpose of enabling the third person to sue the undisclosed principal and for the purpose of enabling that principal to intervene and sue the third party. And the same rule applies even though the existence and identity of the principal are known to the third person at the time when the contract is made in the agent's name (u). *A fortiori* this is also the case where the agent contracts anonymously—that is to say, expressly on behalf of some principal whose identity he does not disclose. In this case also, whether the contract is oral or in writing, evidence is admissible for the purpose of identifying the principal thus indicated so that he may himself sue upon the contract or may himself be sued upon it. We shall see later that where an agent enters into a contract without disclosing the existence and identity of his principal, he may himself be liable on the contract as well as his principal, and may himself be entitled to sue on the contract alternatively with his principal. In the meantime, however, we

(t) *Skinner v. Stocks* (1821), 4 B. & Ald. 437; 106 E. R. 997; *Higgins v. Senior* (1841), 8 M. & W. 834; 151 E. R. 1278.

(u) *Calder v. Dobell* (1871), L. R. 6 C. P. 486.

are concerned exclusively with the rights and liabilities of the principal himself.

The foregoing rule, so far as it extends to contracts in writing, may be regarded as an anomalous exception to the general principle which makes a written instrument conclusive evidence of the terms of the contract and rejects all extrinsic evidence for the purpose of varying, contradicting, or adding to those terms. Notwithstanding this general principle, extrinsic evidence is admissible to show that a written contract purporting to be made between A and B was in reality made by B as agent for C, and therefore is in reality a contract between A and C.

But although extrinsic evidence is thus admitted to add another and undisclosed party to the contract—namely, the undisclosed principal—it is not admitted for the opposite purpose of eliminating the agent as a party. If on the face of the instrument the agent is a party thereto so as to be liable thereon, extrinsic evidence as to the existence and identity of an undisclosed principal has not the effect of *substituting* him for the agent, but has merely the effect of *adding* the principal to the contract along with his agent. In *Higgins v. Senior* (x) the rule with respect to written contracts made for an undisclosed principal is thus stated and explained by Parke, B.: “There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority, is in law the act of the principal” (y).

Apart altogether from the conclusive operation of a written instrument, the rule that a concealed principal is entitled to intervene

(x) (1841), 8 M. & W. 834, 844; 151 E. R. 1278, 1282.

(y) In *Wake v. Harrop* (1862), 6 H. & N. 768; 1 H. & C. 202; 158 E. R. 317, 859, the agent who had signed a charterparty in a manner which apparently made him a party to it was permitted to plead that it was expressly understood between the third person and himself that he was not to be a party to the contract, but was signing as agent only. But such a case is to be regarded either as one of mutual mistake in the expression of a written contract, or else as one in which the signature of the defendant was affixed to the instrument *alio intuitu* as in *Pym v. Campbell* (1856), 6 E. & B. 370; 119 E. R. 903, and other similar cases.

and sue upon a contract made by an agent in his own name is anomalous as imposing upon the third person a contract with a person with whom he had no intention of contracting. An agreement which is really between A and B is treated by the law as a contract between A and C, although there is no *animus contrahendi* as between A and C at all. Although this anomalous rule is well established it is clear that it cannot be invariable as extending to contracts of every class. It can have no application to those contracts which may be distinguished as *personal*—contracts, namely, in which the identity of one contracting party is an important element in the nature of the obligations assumed by the other. The rule can in the nature of things apply only to *impersonal* contracts—those, namely, in which the substance of the obligations assumed by the obligor is unaffected by the identity and personality of the obligee. A contract to marry, or a contract of personal service between an employer and a servant, is personal in this sense (z). It is not possible for any undisclosed third person to intervene as the principal of one of the contracting parties for the purpose of suing the other party on such a contract. He who undertakes to marry X, or to enter the service of Y, cannot be sued by any other person as the undisclosed principal of X or Y. Most contracts, however, are impersonal. It is immaterial to the nature of the obligations undertaken by a party whether they are performed by him in favour of A or in favour of B. In such cases, therefore, there is no reason why B should not intervene as the undisclosed principal of A. This is ordinarily the case, for example, with contracts of pecuniary obligation. In general (a) it matters nothing to the debtor whether he is required to pay the person with whom he purported to contract or to pay some third person who intervenes as an undisclosed principal. So with contracts for the sale of goods or of land. In the case of all such impersonal contracts, therefore, although they are made by an agent in his own name without disclosure of the existence of any principal, his principal may intervene and sue upon the contract instead of his agent (b).

Such, then, is the general rule which enables a principal to sue

(z) So also is a contract entered into between a creditor and his debtor with the object on the part of the creditor of setting off the debt against his liability under the contract. *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28.

(a) Cf. preceding note.

(b) *Dyster v. Randall & Sons*, [1926] Ch. 932. As to the case where fraud has been employed for the purpose of inducing the third person thus to enter into a contract which he would not have entered into if he had known of the existence and identity of the concealed principal see *Gordon v. Street*, [1899] 2 Q. B. 641.

and be sued on all contracts which are made by his agent with due authority on his behalf, whether they are made orally or in writing, and whether they are made in the name of the principal, or in that of the agent, or anonymously, disclosing the existence of a principal but concealing his identity. This rule, however, is subject to a number of exceptions which must now be dealt with.

(1) Contracts under the Statute of Frauds, 1677, and Similar Statutes.

When the contract requires to be made or evidenced in writing under the Statute of Frauds, 1677, section 4 of the Sale of Goods Act, 1893, or section 40 of the Law of Property Act, 1925, no note or memorandum is sufficient which does not name or otherwise identify the parties to the contract. How does this rule affect the doctrine now under consideration with respect to undisclosed principals? When a contract under any of these statutes is made in writing by an agent, can oral evidence be adduced to show the existence or identity of a principal so as to enable that principal to sue or be sued on the contract? This question is to be answered by a distinction. It depends on whether the agent has contracted *personally* so as to have made himself a party to the contract. If so, the note or memorandum is sufficient under the statutes, and it can be supplemented by oral evidence as to the existence or identity of the principal, who can sue or be sued accordingly in pursuance of the general rule as to the rights and liabilities of undisclosed principals (c). But if, on the contrary, the agent has not contracted personally, and is not himself a party to the contract, the note or memorandum is insufficient under the statutes, inasmuch as it does not disclose the identity of two parties to the contract. This insufficient note or memorandum cannot be made good by oral evidence identifying the principal. The general rule as to undisclosed principals is therefore excluded in this case by the operation of the statutes. Thus, in *Potter v. Duffield* (d), where a written contract was signed by an agent "on account of the vendor", without naming or otherwise identifying him, it was held that there was no note or memorandum sufficient under the Statute of Frauds. It is not necessary, however, that the principal should be actually named. Any written identification of him is sufficient. Thus in

(c) *White v. Proctor* (1811), 4 Taunt. 209; 128 E. R. 309; *Higgins v. Senior* (1841), 8 M. & W. 834; 151 E. R. 1278; *Lovesy v. Palmer*, [1916] 2 Ch. 233.

(d) (1874), L. R. 18 Eq. 4.

Rossiter v. Miller (e) the description of the agent's principal in a contract of sale as "the proprietor" was held sufficient.

(2) Contradiction of Written Instrument.

In the case of a written contract made by an agent in his own name an undisclosed principal cannot intervene as plaintiff or defendant if the necessary extrinsic evidence of his existence and identity would contradict the express words of the written instrument. Thus in *Humble v. Hunter* (f) an agent contracting in his own name was described in a charterparty as the owner of the ship. His principal, the real owner, sued on the contract. It was held that he could not so intervene, inasmuch as the written contract expressly precluded the supposition that the person in whose name it was made was a mere agent. But the description of the agent as "charterer" does not fall within this rule, inasmuch as it is consistent with this description to allege that he chartered the ship as agent merely (g).

(3) Express Provision to the Contrary.

In any case, whether the contract is written or oral, the rights and liabilities of the undisclosed principal may be excluded by an express provision between the agent and the third person that they alone are to be the parties to the contract. Although an agent is duly authorised to create privity of contract between his principal and the third person, and though he actually does so even when he contracts in his own name without disclosing his principal, nevertheless there is no rule of law that he must do so. He may, on the contrary, elect, by express agreement with the third person, to keep the principal out of the contract altogether (h).

(4) Contracts by Deed.

Subject to some qualifications (i), the general rule at common law is that no person can sue or be sued on a contract by deed unless he be one of the parties to it. If, therefore, such a contract were made by an agent in his own name as a party to the deed, his principal could not sue or be sued on that contract, though his existence and identity were disclosed by the deed itself. It was

(e) (1878), 3 App. Cas. 1124.

(f) (1848), 12 Q. B. (N.S.) 310; 116 E. R. 885

(g) *Fred. Drughorn, Ltd. v. Rederiaktiebolaget Transatlantic*, [1919] A. C. 203, followed in *Danziger v. Thompson*, [1944] K. B. 654 ("tenant").

(h) *Montgomerie v. United Kingdom Mutual Steamship Association*, [1891] 1 Q. B. 370; *United Kingdom Mutual Steamship Association v. Nevill* (1887), 19 Q. B. D. 110; *Collins v. Associated Greyhound Racecourses, Ltd.*, [1930] 1 Ch. 1

(i) See pp. 382 *et seq.*, *ante*.

necessary, therefore, that an agent for the execution of a deed should make the principal a party to the deed, and should execute the deed in his principal's name (j). Now, however, the Law of Property Act, 1925 (k), provides as follows: “(1) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and under his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act, and operates without prejudice to any statutory direction that an instrument is to be executed in the name of an estate owner.”

(5) Bills of Exchange.

Under the Bills of Exchange Act, 1882 (l), following the common law, an undisclosed principal cannot be liable on a bill of exchange or promissory note. The only persons who can be sued on such instruments are those parties who, personally or by their agents, have signed the instruments. An assumed or trade name, however, is good enough for this purpose, and the name of a firm is equivalent to the name of each of the partners.

(6) Foreign Principals.

In certain classes of contracts, such as the purchase of goods in England by an English agent on behalf of a foreign buyer, there is a presumption based on mercantile usage that the English agent has no authority to establish privity of contract between his foreign principal and the English sellers. The presumption in such a case is that the English buying agent is not a true agent at all, but a mere intermediary authorised to purchase the goods in his own name and to transmit them to his foreign principal on terms settled by the contract of employment between them. In such a case the foreign principal does not become a party to the contract of purchase, and cannot sue or be sued upon it. To make him a party to the

(j) *Schack v. Anthony* (1813), 1 M. & S. 573; 105 E. R. 214; *Torrington v. Lowe* (1868), L. R. 4 C. P. 26; *Berkeley v. Hardy* (1826), 5 B. & C. 355; 108 E. R. 132.

(k) S. 123 (1), re-enacting s. 46, Conveyancing Act, 1881.

(l) Ss. 23, 89.

contract it is necessary to prove affirmatively that actual authority was conferred upon the English buying agent to pledge his principal's credit and create privity of contract between him and the English sellers. In *Armstrong v. Stokes* (m) it is said by Blackburn, J.: "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit" (n).

It is to be observed that this rule is not a true exception to the general doctrine that a principal, disclosed or undisclosed, may sue or be sued upon the contracts of his agent. It is merely a rule establishing a presumption that in certain cases an apparent agent is not a true agent having authority to establish privity of contract between his principal and third persons (o).

§ 148. The Relation Between the Agent and the Third Person

We proceed in the next place to consider this question. In what cases can the agent himself sue, or be sued by, the third person? The general rule in this case is precisely the opposite of that which determines the right and liability of the principal to sue or be sued. In general the agent can neither sue nor be sued. He is merely an intermediary by whose instrumentality a contractual obligation has

(m) (1872), L. R. 7 Q. B. 598, 605.

(n) See also *per* Blackburn, J., advising the House of Lords in *Ireland v. Livingstone* (1872), L. R. 5 H. L. 395, 407-409, and *Robinson v. Mollet* (1875), L. R. 7 H. L. 802, 809-810. Cf. *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K. B. 141.

(o) As to the relations so constituted between a commission agent and a foreign principal see *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797.

is expressly declared that the agent is to be a party to the exclusion of any principal (q).

If an agent contracts in his own name without disclosing the existence of any principal, he contracts personally; for if the contract is oral he is estopped by his own representations from denying that he is a party to it, and if the contract is in writing such a contention is excluded by the terms of the instrument. But in such a case the undisclosed principal is also a party to the contract concurrently with the agent, and can sue and be sued upon it—unless the words of the written instrument are inconsistent with such a conclusion (r).

If, on the contrary, the agent contracts professedly as an agent, either for a named or for an unnamed principal, the agent is *prima facie* not himself a party to the contract and can neither sue nor be sued upon it. This presumption may be excluded by the facts of the case in an oral contract, or by the words of the instrument in a written contract. In *Fleet v. Murton* (s) it is said by Blackburn, J.: “There is no doubt at all, that the rule of law laid down in the case of *Higgins v. Senior* (t), and the other cases there cited, such as *Jones v. Littledale* (u), is perfectly correct, namely, that where the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he declares himself to be the contracting party, he thereby says, ‘I am to be liable’. And though he has done this, yet his principal also is liable: because the agent who has made the contract does bind his principal, though he has chosen to bind himself also. . . . That the agent is liable is no answer, and no reason why the principal should not be responsible.”

In the case of a written contract made by an agent the question whether the agent has contracted personally or merely as agent is a question of the proper interpretation of the written instrument. For this purpose it is necessary to have regard both to the wording of the body of the instrument and to the manner in which it has been signed by the agent. If he has signed it in his own name without qualification, he will be held to have contracted personally, unless a contrary intention is sufficiently expressed in the body of the instrument. If, however, he expressly signs “as agent” or with some equivalent qualification, this is sufficient to exempt him from

(q) See pp. 412 *et seq.*, *ante*.

(r) *Humble v. Hunter* (1848), 12 Q. B. (N.S.) 310; 116 E. R. 885; *Fred. Drug-horn, Ltd. v. Rederiaktiebolaget Transatlantic*, [1919] A. C. 203.

(s) (1872), L. R. 7 Q. B. 126, 131.

(t) (1841), 8 M. & W. 834; 151 E. R. 1278.

(u) (1837), 6 A. & E. 486; 112 E. R. 186.

personal liability, even though in the body of the instrument he appears as a contracting party. In *Gadd v. Houghton* (x) fruit brokers were held not to have contracted personally, although they signed the contract in their own names without qualification, inasmuch as the body of the instrument stated that they sold the fruit "on account of" a named foreign principal. Conversely, in *Universal Steam Navigation Co., Ltd. v. McKelvie* (y), the defendants appeared in the body of a charterparty to be the actual charterers, but they were nevertheless held not to have contracted personally, inasmuch as they had qualified their signature by adding to it the words "as agents", though the identity of their principal was not disclosed (z).

In construing a written contract for the purpose of determining whether it imposes personal responsibility on the agent by whom it was made, there will be read into the contract as an implied term thereof any proved commercial usage imposing such responsibility in contracts of that class. It has been held that evidence of such a usage does not contradict the written instrument so as to be inadmissible. It does not seek to discharge the principal, who is already a party to the contract, but merely seeks to add another party—namely, the agent himself.

Thus, in *Fleet v. Murton* (a), fruit brokers signing a contract which disclosed the existence but not the name of their principal were held liable on that contract on proof of a custom in the London fruit trade that brokers who did not disclose the name of their principal were personally liable on their contracts (b).

Where a contract is made by an agent professedly for a principal whose identity is not disclosed, evidence is admissible to show that the agent had no such principal, but intended to contract exclusively on his own behalf—that he was, so to speak, his own principal. On proof of this the agent is deemed, notwithstanding the words of the contract, to have contracted personally, and he can both sue and be sued accordingly (c).

(x) (1876), 1 Ex. D. 357.

(y) [1923] A. C. 492.

(z) See also *Kimber Coal Co., Ltd. v. Stone and Rolfe, Ltd.*, [1926] A. C. 414.

(a) (1872), L. R. 7 Q. B. 126.

(b) *Pike v. Ongley* (1887), 18 Q. B. D. 708, is a similar decision. Fry, L.J., there says at p. 713: "By the terms of the document itself the owner is liable; the custom says the broker shall be liable also; there is nothing in that which is inconsistent with the contract, though it would be inconsistent if the custom were to exclude the liability of the owner". See also *Dale v. Humfrey* (1858), E. B. & E. 1004; 120 E. R. 783.

(c) *Schmaltz v. Avery* (1851), 16 Q. B. (N.S.) 655; *Harper v. Vigers*, [1909] 2 K. B. 549; *Gardiner v. Heading*, [1928] 2 K. B. 284.

There was formerly some authority for the proposition that if an agent purporting to contract on behalf of a principal had in fact no authority to do so, so that the contract did not bind the principal, the agent was himself personally liable on the contract as if made personally by himself. In *Lewis v. Nicholson (d)*, however, it was held that there was no such general rule. In general, the remedy of a third person who has been misled into making a contract with an agent who had no authority to make it is not to treat the agent as being himself the contracting party, but to sue him for damages for the breach of an implied warranty of authority in accordance with a rule which is about to be considered. There are exceptional cases, however, in which, although a person contracts professedly and ostensibly as an agent, the principal is known to both the parties to be a non-existent person who has in fact given no authority for the contract. In such cases there is no implied warranty of authority, and the contract is construed as being made personally by the professed agent, this being the only intelligible meaning and operation that can be given to such a contract. A familiar illustration of this rule is the case of a contract made by promoters on behalf of a company about to be incorporated. Such an ostensible principal is known by both parties to be a non-existent person, unable either to authorise the contract or to ratify it even after incorporation. The profession of agency is therefore construed as meaning merely that the contract is made for the benefit of the company, and the contract is construed as being made between the promoters personally and the third person, otherwise it could have no operation at all (e).

§ 149. Warranty of Authority

In 1857, in the case of *Collen v. Wright (f)*, the Court of Exchequer Chamber established the rule that every person who professes to contract (g) as agent for a principal thereby impliedly warrants that he is duly authorised by the principal to make that contract on his behalf. For any breach of this warranty the agent is responsible in damages to the third person with whom the contract is made.

(d) (1852), 18 Q. B. (N.S.) 503; 118 E. R. 190.

(e) *Kelner v. Barter* (1866), L. R. 2 C. P. 174.

(f) (1857), 8 E. & B. 647; 120 E. R. 241; see also *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1.

(g) The principle of *Collen v. Wright* is not restricted to cases of contract but applies equally where authority is professed to enter into any other act in the law. *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

It makes no difference in applying *Collen v. Wright* whether the agent knows that he has no authority, or honestly believes that he has. He is equally liable as for a breach of his implied warranty in either case, though in the case of a fraudulent misrepresentation of authority the third person has the alternative remedy of suing in tort for damages for deceit, instead of in contract for breach of warranty (h).

Nor does it make any difference whether the agent has never possessed the requisite authority at all, or originally possessed an authority which has lapsed or been revoked or has otherwise come to an end, as, for example, by the death of the principal (i).

Nor does it make any difference whether the agent's want of authority is due to the absence of *de facto* authorisation by the principal, or is due to the fact that such authorisation is legally ineffective, owing to want of the necessary contractual capacity on the part of the principal or otherwise. The agent impliedly warrants, not merely that the principal has in fact authorised him to make the contract, but that he has effectively authorised him to do so. Thus, in *Richardson v. Williamson* (k), the directors of a building society which possessed no borrowing powers were held personally liable on an implied warranty of authority to a person from whom they had borrowed money on behalf of the society. So in *Firbank's Executors v. Humphreys* (l) the directors of a company were held personally responsible in damages for the issue of debentures which the company had no power to issue.

There is no breach of the warranty of authority, however, where the want of authority is due to facts known to the third person at the time when he contracts with the agent. In such a case the third person has been in no way misled by any express or implied misrepresentation of the facts by the agent, and when the third person knows all the material facts he must judge for himself whether the contract which he makes with the agent is good in law or not (m).

Nor is there any implied warranty if it is excluded by the terms of the contract made by the agent with the third person. Thus in *Lilly v. Smales* (n), where the defendant signed a charterparty "by telegraphic authority, as agent", it was held that he was exempted

(h) *Pollull v. Walter* (1832), 3 B. & Ad. 114; 110 E. R. 43.

(i) *Yonge v. Toynbee*, [1910] 1 K. B. 215.

(k) (1871), L. R. 6 Q. B. 276.

(l) (1886), 18 Q. B. D. 54.

(m) *Rashdall v. Ford* (1866), L. R. 2 Eq. 750; *Eaglesfield v. Londonderry* (1878), 38 L. T. 303.

(n) [1892] 1 Q. B. 456; *Benton v. Campbell & Co., Ltd.*, [1925] 2 K. B. 416.

from liability for want of authority by proof of a mercantile usage in accordance with which this form of signature was understood to exclude any further warranty than that the agent has actually received a telegram which, if correct, authorises the charterparty signed by him.

There can, of course, be no implied warranty of authority when the agent, although capable of acting as an agent so as to bind a principal, has no such contractual capacity as would entitle him to contract on his own behalf, as, for example, when he is a minor.

The measure of damages in an action for breach of an implied warranty of authority is the loss suffered by the third person through the invalidity of the contract made by the agent. The third person is entitled to be put in the same pecuniary position as if the contract had been duly and effectively authorised by the supposed principal. If, for example, the directors of a company which has no borrowing power borrow money on its behalf they are liable for the full amount so borrowed if the company is solvent, but if the company is insolvent their liability is reduced to the value of the debt which would have been actually incurred by the company if the contract had been binding (o). There is for this reason a substantial difference between the liability of an agent on an implied warranty of authority and his liability on the contract itself when he has contracted personally (p).

§ 150. Concurrent Liabilities of Both Principal and Agent

We have now considered two distinct questions touching the relation between a principal and his agent on the one side and the third person on the other. The first of these questions is, In what cases may the principal sue or be sued on a contract made by his agent? The second is, In what cases may the agent himself sue or be sued on a contract made by him on behalf of his principal? The answers to these two questions disclose that there are many cases in which the rights and liabilities of the principal are *concurrent* with those of his agent—cases, that is to say, in which both the principal and the agent may sue or be sued on the contract. It becomes necessary, accordingly, to consider two further questions which arise out of this complexity. The first of these is, How does the law reconcile and harmonise the concurrent liabilities of both

(o) *Firbank's Executors v. Humphreys* (1886), 18 Q. B. D. 54.

(p) The principles formulated in *Smout v. Ilbery* (1842), 10 M. & W. 1; 152 E. R. 357, cannot be regarded as of authority since *Collen v. Wright*. See *Yonge v. Toynbee*, [1910] 1 K. B. 215.

principal and agent to be sued by the third person upon one and the same contract? The second is, How does the law reconcile and harmonise the concurrent rights of both principal and agent to sue the third person upon one and the same contract?

As to the first of these questions, it is settled law that, when both principal and agent are liable on the same contract in accordance with the principles already indicated, their liability is not joint, or joint and several, but is alternative. The third person is entitled to sue either the principal or the agent, but is not entitled to sue both of them as if they had entered into a joint contract (g). There are three methods by which this right of choice between the liability of the principal and that of the agent may be destroyed, so that the third person's right of recourse becomes limited to one of these parties exclusively.

(1) Merger.

In the first place, if the third person sues and obtains judgment against either the principal or agent, he cannot thereafter bring any further action against the other; and this is so even although the judgment is unsatisfied, and although he was unaware, when he so obtained judgment against the agent, of the existence or identity of the principal. By the merger of the cause of action in a judgment against one of the parties to the contract the right of recourse against the other is absolutely barred (r).

(2) Election.

In the second place, the right of the third person to sue either the principal or the agent is destroyed by any act which amounts to an *election* between them. Since the liabilities of the principal and agent are alternative the third person has a choice between them, and when he has once made this choice or election by any unequivocal indication of his intention he cannot thereafter change his mind. Such an act of conclusive and final election, however, involves knowledge on the part of the third person of the existence of the alternatives between which he has the right of election. He must know that the principal exists before any act done by him can be regarded as a binding election to discharge the principal and to treat the agent alone as a party to the contract. In *Scarf v. Jardine* (s) this doctrine of election is thus formulated by Lord

(g) *Morel v. Westmorland*, [1903] 1 K. B. 64; [1904] A. C. 11.

(r) *Priestly v. Fernie* (1865), 3 H. & C. 977; 159 E. R. 820.

(s) (1882), 7 App. Cas. 345, 360-361.

Blackburn: "Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted; it is final and cannot be altered. *Quod semel placuit in electionibus amplius displicere non potest*. . . . When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made. . . . The principle, I take it, running through all the cases as to what is an election is this—that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election" (t).

The act of subsequent election, by which the third person thus destroys *ex post facto* his option to sue either the principal or agent on a contract under which both of these persons are originally liable, must be distinguished from an act of initial election whereby the third person chooses to make a contract exclusively with the agent personally, notwithstanding his knowledge of the existence or identity of a principal. In this case the agent is *ab initio* the sole party to the contract to the exclusion of his principal.

(3) Estoppel.

In the third place, the alternative right of the third person to sue either principal or agent may be destroyed not merely by judgment or by election, but also by estoppel. The principal may be misled by the words or conduct of the third person into the belief that he has been paid by the agent, or intends to look to the agent exclusively for payment. If in such a belief the principal settles accounts with the agent, the third person will be estopped from thereafter holding the principal liable on the contract (u).

(t) See also *Calder v. Dobell* (1871), L. R. 6 C. P. 486; *Curtis v. Williamson* (1874), L. R. 10 Q. B. 57.

(u) *Wyatt v. Hertford* (1802), 3 East 147; 102 E. R. 553.

§ 151. Concurrent Rights of Both Principal and Agent.

We are to consider, in the next place, how the law reconciles the rights of both principal and agent to sue the third person on one and the same contract. Which of these two conflicting rights is entitled to priority over the other? The general rule is that the right of the principal prevails over that of his agent. The right of the agent to enforce the contract is destroyed by the intervention of the principal in the exercise of his own right (*x*).

An exception to this rule exists, however, in those cases in which the agent possesses, as against his principal, some special interest in the subject-matter of the contract—as, for example, in the case of an auctioneer or factor entitled to a lien on the property sold. In such cases the agent possesses as against his principal a right to enforce the contract on his own behalf in respect and to the extent of the legal interest so vested in him, and in this respect his right has priority over that of the principal (*y*).

(*x*) *Atkinson v. Cotesworth* (1825), 3 B. & C. 647; 107 E. R. 873; *Sadler v. Leigh* (1815), 4 Camp. 195; 171 E. R. 63.

(*y*) *Williams v. Millington* (1788), 1 H. Bl. 81; 126 E. R. 49; *Drinkwater v. Goodwin* (1775), Cowp. 251; 98 E. R. 1070; *Robinson v. Rutter* (1855), 4 E. & B. 954; 119 E. R. 355; *Isberg v. Bowden* (1853), 8 Ex. 852; *Manley & Sons, Ltd. v. Berkett*, [1912] 2 K. B. 329.

CHAPTER XVII

CONTRACTS IN TRUST FOR THIRD PERSONS (a)

§ 152. Application of the Trust Principle

One who is a party to a contract may in equity hold his rights under it in trust for a third party. "One question made in argument has been whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that" (b). "The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a *chose in action*, or of a right or obligation under an ordinary legal contract, just as much as a trust of land" (c).

The application of a trust to extend the operation of a contract has recently been expounded by Lord Wright (d) in the following words. "No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (e): 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*'. In that case, as in *Tweddle v. Atkinson* (f), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which

(a) On the general topic see A. L. Corbin, *Contracts for the Benefit of Third Persons*, 46 L. Q. R. 12 (dissented from in *Re Schebsman*, [1943] Ch. 366, 370, Uthwatt, J.; affirmed [1944] Ch. 83, C. A.); Law Revision Committee's Report on the Statute of Frauds and Consideration (Cmd. 5449), paragraphs 41-49; and Finlay, *Third Party Contracts* (1939).

(b) Wigram, V.-C., in *Fletcher v. Fletcher* (1844), 4 Ha. 67, 74; 67 E. R. 564, 567.

(c) Lord Shaw, in *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108, 124.

(d) Delivering the judgment of the Privy Council in *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70, 79.

(e) [1915] A. C. 847, 853. See also *Harmer v. Armstrong*, [1934] Ch. 65, per Lawrence, L.J., 86-7.

(f) (1861), 1 B. & S. 393; 121 E. R. 762.

qualifies the legal rule, and which has received effect in many cases, as, for instance, *Robertson v. Wait* (g); *Affrèteurs Réunis Société Anonyme v. Leopold Walford* (London), Ltd. (h); *Lloyd's v. Harper* (i)—namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee can then take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights" (k).

Our task in the present chapter is to examine the extent to which the equitable device of a trust can be utilised for the purpose of evading the limitations placed by the common law on the operation of a contract.

§ 153. A Party to a Contract may be a Trustee of it *Ab Initio* or by Subsequent Declaration

A party to a contract may become a trustee of his rights under it for a third person (whom we shall hereafter generally call the beneficiary) by declaring a trust at a time subsequent to the making of the contract; or he may become a trustee of those rights at the very moment when the contract is made. In the former case the contractual rights vest, on the making of the contract, in the party for himself beneficially both at law and in equity, and not subject to any trust. It is only by declaration made after the contract has come into existence that the party assumes the character of trustee. In the latter case the party becomes a trustee of the contractual rights not because subsequently to the making of the contract he declares a trust of them but because *ab initio* he enters into, or is named as a party to, the contract as a trustee (l).

§ 154. Position of Trustee as Against the Other Contracting Party

Inasmuch as what the trustee party to the contract holds in trust for the beneficiary is the trustee party's rights under the con-

(g) (1853), 8 Ex. 299; 155 E. R. 1360.

(h) [1919] A C 801.

(i) (1880), 16 Ch. D. 290.

(k) See also *Gregory v. Williams* (1817), 3 Mer. 582, 589-590; 36 E. R. 224, 227, per Sir Wm. Grant, M.R. But in *Re Schebsman*, [1944] Ch. 83, Lord Greene, M.R., at p. 89, uttered a warning against importing into a contract the idea of a trust when the parties have given no indication that such was their intention.

(l) *Harmer v. Armstrong*, [1934] Ch. 65, per Lawrence, L.J., 87, 88; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, per Jessel, M.R., 129; *Fletcher v. Fletcher* (1844), 4 Ha. 67; 67 E. R. 564. By virtue of s. 11, Married Women's Property Act, 1882, a husband or wife taking out a policy of life insurance may in certain circumstances be *ab initio* a trustee of it for beneficiaries named in the policy.

tract it is next necessary to inquire what those rights will be. Cases where the trust is declared only subsequently to the creation of the contract need not detain us, for the extent of the rights as against the other contracting party conferred by the contract on the trustee party cannot ordinarily be affected by the subsequent declaration of trust. Difficulties are presented, however, by certain cases where the contractual rights vest *ab initio* in the promisee as trustee.

These latter cases are of two kinds, which may be formulated thus: (i) contract by A with B to do something for B who is a trustee for C; and (ii) contract by A with B who is a trustee for C to do something for C. So far as the first kind of case is concerned it is clear that if the contract as between A and B would be enforced by equity *in specie* (m), the fact that B is a trustee would not render the equitable remedy any the less available. Moreover, as a common law Court would not notice a trust as such, B has vested in him a cause of action at common law enforceable in the same way and to the same extent as though he were not a trustee at all (n).

With regard to the second kind of case, however, the position is not at first sight so clear. The promisee is to hold in favour of the beneficiary the rights which at common law and in equity accrue to the promisee against the promisor. But what are those rights? If, indeed, the contract is one which equity will enforce *in specie* (o) the right which is the subject-matter of the trust will be substantial. Where, however, the sole remedy is in damages it might at first sight appear that the damages would be nominal only. The general rule is that the measure of substantial damages in contract tends towards the ideal of giving the plaintiff such a sum of money as will place him in the position in which he would have been had the contract been performed; but if the plaintiff's position would not have been different even had the contract been performed the damages will be nominal only (p). How then, it may be asked, is B's position any the worse if A fails to perform his promise to B to do something for C? And unless B can recover substantial

(m) See p. 593, *post*.

(n) Cf. *Schlesinger v. Mostyn*, [1932] 1 K. B. 349, where a man covenanted with the trustees of his marriage settlement to pay the premiums on a policy of life insurance which he transferred to them to hold on the trusts of the settlement. On his failure to pay a premium the trustees paid it and claimed the amount from the covenantor as damages for breach of covenant. It was contended by the defendant that the damages recoverable were nominal only, but McCardie, J., held that the trustees were entitled to recover the amount they had paid to repair the breach of covenant.

(o) See p. 593, *post*.

(p) See pp. 578, 583, *post*.

damages how can the rights in equity of the beneficiary C be more extensive?

That substantial recovery in equity can be had by the beneficiary cannot be doubted, for it is clearly established by the well-known cases of *Gregory v. Williams* (q) and *Tomlinson v. Gill* (r). In the former case the defendant, to whom one Parker was indebted, gave to his debtor a promise which as far as material was as follows: "Mr. Williams will satisfy Gregory's demand, which he apprehends is about £900, upon Parker's relinquishing possession of the farms, and assigning to him all his property. . . ." On suit being brought by Gregory, joining as co-plaintiff Parker, "this agreement", according to the headnote, "was enforced against W. to the extent of £900". Sir William Grant, M.R., expressed doubt whether at common law Gregory could recover inasmuch as he was not a party to the agreement. But "Parker acts as his trustee; and Gregory may derive an equitable right through the mediation of Parker's agreement. . . . Gregory has a right to insist upon the benefit of the promise made to Parker". In *Tomlinson v. Gill*, which had been followed by the Master of the Rolls, the defendant Gill promised that if the widow of the intestate John Gill would permit him to be joined with her in letters of administration of the intestate's assets, he would make good any deficiency of assets to discharge the intestate's debts. Joint administration was accordingly taken out. The creditors subsequently commenced proceedings in Chancery for performance of the promise. Lord Hardwicke, L.C., decreed accordingly. "He [the plaintiff] could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them."

It seems clear that the basis of both of these decisions was that at common law the promisee could have maintained an action for substantial damages (s). That this is in fact the common law rule

(q) (1817), 3 Mer. 582; 36 E. R. 224.

(r) (1756), Amb. 330; 27 E. R. 221.

(s) It might have been thought that in that case the beneficiary should have been left to sue at common law in the name of the promisee. But "If the Court [of equity] was properly seised of one matter which was closely connected with another matter not usually cognisable in equity, the acknowledged jurisdiction over the one drew to it a jurisdiction over the other, although that matter in itself could be properly dealt with in a Court of law". Ashburner, *Equity* (2nd ed.), p. 43. In both *Gregory v. Williams* and *Tomlinson v. Gill* the bills prayed for an account, and as Lord Hardwicke said in the latter case: "that draws to it relief, like the common case of a bill to be paid out of assets. It was at first doubted whether the Court should go further than to take the account; but it was afterwards settled, that the Court ought not to make two suits out of one, but give complete satisfaction on such a bill, by decreeing the debt to be paid".

is fully borne out by *Lamb v. Vice* (t) and *Robertson v. Wait* (u). *Lamb v. Vice* was an action on a bond. The bond had been taken by the plaintiff, the Knight Marshal of the Palace Court, from an officer of that Court and was conditioned for the due discharge of the officer's duties towards suitors. The officer having negligently performed his duties in respect of a particular suitor and thereby caused that suitor loss, the plaintiff sued on the bond. Judgment went by default, and pursuant to statute (x) a writ of inquiry issued to assess "the damages that the plaintiffs shall have sustained" by the breach of the condition of the bond. It was contended that the plaintiff had suffered no damage and was entitled to a verdict for nominal damages only, but the Court held that the plaintiff was entitled to substantial damages. Lord Abinger, C.B., said: "The plaintiff clearly was a trustee for Moses; he might sue on the bond in the plaintiff's name, or the plaintiff might sue for the benefit of Moses. Nothing is more common than for a *cestui que trust* to sue on a bond in the name of his trustee". And Parke, B., remarked: "The object of this bond is not merely to indemnify the obligee from actual damage to himself: according to the practice of the Palace Court, the Knight Marshal takes such a bond, as a trustee for the suitors who may really be injured by the breach of its conditions".

Robertson v. Wait (y) was an action of assumpsit in the Court of Exchequer. The plaintiffs chartered a vessel of the defendants to carry a cargo from Liverpool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to Ewing & Co., merchants at Calcutta, on the usual terms, one of which was that Ewing & Co. might procure the homeward freight at 5 per cent. commission. The defendants having contracted with another party for the homeward freight, the plaintiffs sued for the amount of commission which Ewing & Co. had been prevented from earning. It was contended by the defendants that the plaintiffs had suffered no damage, but the Court held them entitled to the amount claimed (z).

(t) (1840), 6 M. & W. 467; 151 E. R. 495.

(u) (1853), 8 Ex. 299; 155 E. R. 1360, followed by the House of Lords in *Les Affrétteurs Réunis S. A. v. Leopold Walford (London), Ltd.*, [1919] A. C. 801.

(x) 8 & 9 Will. 3, c. 11, s. 8.

(y) *Supra*.

(z) The later case of *West v. Houghton* (1879), 4 C. P. D. 197, is sometimes thought to be in conflict with *Robertson v. Wait*. In *West v. Houghton* a landlord who had let his farm to a tenant subsequently leased the sporting rights over it (these presumably being excepted from the lease of the farm) to the defendant, and the defendant covenanted with the plaintiff to "keep down and destroy the rabbits on the said estate, so that no appreciable damage may be done to the crops on the said estate". The rabbits were not so kept down, and the plaintiff

It being therefore fully established that a promisee can recover substantial damages for breach of a promise made to him to do something for a third party, does this constitute an exception to the ordinary rule as to the measure of damages in contract or is it reconcilable with that rule? It is submitted that it is reconcilable with the ordinary rule. Non-performance of the promise is to be reckoned a loss to the promisee because if he is now to have what was promised to him—*viz.*, that the third party should enjoy the contemplated advantage—he must provide that advantage at his (the promisee's) own expense (a). Non-performance, therefore, does not merely cause a substantial loss to the third party, but also to the promisee and it is for this reason that he is entitled to recover substantial damages.

The same conclusion, *viz.*, that a promise by A to B to do something for C is enforceable by B at common law in an action

accordingly sued the defendant and claimed to recover as damages a sum sufficient to compensate the farming tenant for the injury done to his crops. The Court held that the plaintiff was entitled to only nominal damages.

It is often said that the difference between *Robertson v. Wait* and *West v. Houghton* is that in the former case the promisee was and in the latter case he was not a trustee for the third party and that this accounted for substantial damages being given in the one case and not in the other. *E.g.*, Mayne, *Damages* (10th ed.), 4. Such statements are presumably founded on certain expressions used by some of the Judges in those cases. Thus Denman, J., in *West v. Houghton* based his judgment "on the short ground that there was no evidence here of any trust between him [the lessor and covenantee] and the occupier at the time of entering into the covenant". And in *Robertson v. Wait*, Parke, B., said: "I entertain no doubt whatever that the plaintiffs are entitled to recover the whole amount as trustees for Ewing & Co." It is not to be supposed, however, that by these statements the Judges meant that the common law Courts recognised the trust in such a way as to award substantial damages to compensate the beneficiary for the promisor's failure to perform his promise to the promisee. Cf. *Evans v. Edmonds* (1853), 13 C. B. 777, 784; 138 E. R. 1407, 1410, and see Ashburner, *Equity* (2nd ed.), pp. 11-14. What they did mean becomes apparent when one considers the precise nature of the facts in each of the two cases.

In *West v. Houghton* the defendant had simply covenanted to do something for the plaintiff. The covenant had not been performed, but the plaintiff did not prove, or claim in respect of, any damage to himself, but only damage to a third party not mentioned in the covenant. As Lord Coleridge, C.J., said, 4 C. P. D. at 202, "here . . . there is no one mentioned as the object of the covenant except the covenantee". Inasmuch as the third party was not within the terms of the covenant, therefore, mere proof of damage to him, even though that damage would not have occurred if the covenant had been performed, was not equivalent to proof of damage resulting to the plaintiff from non-performance of the covenant. In *Robertson v. Wait*, on the other hand, the contract was in terms to do something for a third party. It is submitted, therefore, that all that the Judges meant in the *dicta* which have been quoted was that in an action on a promise by A to B to do something for B it is irrelevant to allege that non-performance has injured C or caused him to lose an anticipated advantage; but it is otherwise when the promise is by A to B to do something for C, for the benefiting of C is the very thing which A has promised B.

(a) That the promisee has not, at the time of his action, provided the advantage for the third party does not seem to matter. Cf. *Loosemore v. Radford* (1842) 9 M. & W. 657; 152 E. R. 277.

for substantial damages, may in some cases be reached in quite a different way, *viz.*, by regarding such a promise as merely the equivalent of a promise by A to B to do something for B. On this view, although in equity the relation between B and C might be that of trustee and *cestui que trust*, yet at common law C would be regarded simply as the nominee or agent of B. Thus in *Re Englebach's Estate* (b) a father took out an endowment policy with an insurance company whereby a sum of money was expressed to be payable to his daughter (in the policy called "the nominee") if she should survive to a certain date, the premiums otherwise being repayable without interest to the proponent, his executors, administrators or assigns. The daughter having survived to the specified date, the company paid the policy moneys to her. Her father, however, had died some years before, and the trustees of the residuary estate under his will claimed against the daughter to recover the policy moneys as part of the residuary estate. *Romer, J.*, decided "that the daughter did not acquire any interest at law or in equity to the policy or the policy moneys merely by reason of the fact that the policy moneys [were] expressed to be payable to her", and, not finding any other evidence that the father had constituted himself a trustee for her, held that the moneys belonged to the estate of the deceased. *Re Foster* (c) was a somewhat similar case where a father took out a policy of insurance on the life of his son, the policy moneys being expressed to be payable to the son's personal representatives or assigns. *Crossman, J.*, said (d): "The representatives of William Edward Foster [the son] are not, in my opinion, and on the true construction of the document, the persons to whom the policy purported to grant the legal right to receive the policy money, or with whom a contract to pay the policy money is made by the policy. The representatives of William Edward Foster are, in my judgment, only the nominees of Robert John Foster [the father], who is the person, and the only person, to whom rights are given, and with whom a contract is made by the policy" (dd).

It may be concluded, therefore, that whether the promise of which a promisee stands in trust for a beneficiary is to do something for the promisee or to do something for the beneficiary there will

(b) [1924] 2 Ch. 348.

(c) [1938] 3 A. E. R. 357.

(d) P. 365.

(dd) Cf. *Uthwatt, J.*, in *Re Schebsman*, [1943] Ch. 366, 370-373; affirmed [1944] Ch. 83.

equally be vested in the promisee, in trust for the beneficiary, a claim against the promisor enforceable for substantial damages. Consistent with this view are a number of judicial statements couched in quite general terms and drawing no distinction between these two different forms of promise. Thus in *Lloyd's v. Harper* (e), which was a case of a promise to do something for a beneficiary, Lush, L.J., said (f): "I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself." And in *Leopold Walford (London) v. Les Affréteurs Réunis S. A.* (g) which was clearly a case of a promise by a party to a contract to pay money to a third person, Pickford, L.J., holding *Robertson v. Wait* (h), which was the same kind of case, to be applicable, thus stated its effect (i): "It is, if A agrees with B that he will pay a certain sum of money to B for the benefit of C, B, as trustee for C, can sue A."

§ 155. Rights and Duties of Parties to the Contract and the Beneficiary

We must next inquire into the rights and duties of the parties to the contract and the beneficiary in so far as they arise out of the existence of the trust. On some of the problems which obviously arise there is little direct authority and guidance must be sought from such of the general principles of trustee law as appear applicable.

It is convenient at the outset to divide the cases into two groups. The first comprises cases where the trustee is not subjected by the contract to any liability to the other party outstanding when the trust comes into existence (k). The position here is simple. The only obligation falling on the trustee in such cases is to hold the promise of the other party upon trust for the beneficiary. The second group of cases comprises those where the contract does at the time when the trust comes into existence subject the trustee to a liability in favour of the other party. For example, A, acting as

(e) (1880), 16 Ch. D. 290.

(f) P. 321; see also *per* Fry, J., 309; and *per* James, L.J., 315.

(g) [1918] 2 K. B. 498 (affirmed [1919] A. C. 801).

(h) (1853), 8 Ex. 299; 155 E. R. 1360.

(i) P. 501.

(k) *E.g.*, *Tomlinson v. Gill* (1756), Amb. 330; 27 E. R. 221; *Gregory v. Williams* (1817), 3 Mer. 582; 36 E. R. 224; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Affréteurs Réunis S. A. v. Leopold Walford, Ltd.*, [1919] A. C. 801.

trustee for X, enters into an agreement to purchase Blackacre from B. Here A cannot call for a conveyance either to himself or to X unless he pays or tenders the purchase-money in accordance with the terms of the contract. In such cases at least four questions call for consideration. (i) To what indemnity is the trustee entitled in respect of his obligations under the contract? (ii) Can the beneficiary compel the trustee to perform those obligations? (iii) Is the trustee entitled as against the beneficiary to agree to a rescission of the contract? (iv) What are the rights of the beneficiary and the party to the contract who is not the trustee against each other?

(i) *Trustee's Indemnity.* The ordinary principles of trustee law seem applicable. The trustee is entitled to be indemnified out of the trust property in respect of all liabilities falling on him in the proper and reasonable execution of the trust (l). Furthermore, if a person, being *sui juris*, elects to accept the position of *cestui que trust*, he will (except in special cases (m)) be under a personal obligation to indemnify his trustee even though the cost of the indemnity exceeds the value of the trust property (n). This indemnity may be claimed by the trustee even before he has performed the obligations in respect of which it exists. The trustee is not bound to pay out of his own pocket in the first instance, but may at once resort to the trust estate or the beneficiary personally (o).

(ii) *Can Beneficiary Compel Trustee to Perform Obligations under Contract?* There seems no principle by which the trustee, simply by reason of his being trustee of the contract, can be under any duty to the beneficiary to carry out at his own expense his obligations under the contract. The nature of a trust is that the trustee is under an equitable obligation to hold the trust property for the beneficiaries, but not under any obligation to augment that property out of his own funds.

An obligation on the part of the trustee to the beneficiary to perform the trustee's side of the contract may, of course, rest on the trustee by reason of matters extrinsic to the mere fact of his being a trustee of the contract. Thus he may be bound by contract with the beneficiary to perform the obligations resting on him under the contract of which he is trustee. Except in such cases as this,

(l) *Stott v. Milne* (1884), 25 Ch. D. 710.

(m) *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139.

(n) *Hardoon v. Belilos*, [1901] A. C. 118; *Ex p. Chippendale, Re German Mining Co.* (1853), 4 De G. M. & G. 19, 52-56; 43 E. R. 415, 427.

(o) *Re Blundell* (1888), 40 Ch. D. 370, 377.

however, it is submitted that a beneficiary can compel a trustee of a contract executory on both sides to perform his side of it only in so far as the trustee can be indemnified in advance out of the trust property or as the beneficiary is himself personally prepared to indemnify the trustee in advance (p).

(iii) Is the Trustee as Against the Beneficiary Entitled to Release or Agree to a Rescission of the Contract? If, on the foregoing principles, the trustee is under a duty to the beneficiary to perform the contract, that will necessarily preclude him, as against the beneficiary, from releasing or agreeing to a rescission of the contract (q). Moreover, upon a sufficient indemnity it may be that he can be required by the beneficiary neither to perform nor to release or rescind the contract but simply to continue liable under it (r). It is submitted, however, that except in these cases, the principle that the trustee is entitled to an indemnity out of the trust property will justify him in releasing the contract or agreeing to a rescission of it if that is the only reasonable way open to him of making the indemnity effective without his assuming some other personal liability (r).

(iv) Rights of the Beneficiary and Other Contracting Party Against Each Other. (a) *Beneficiary Proceeding Against other Contracting Party.* At common law the beneficiary could not have sued upon the contract. He might, however, have proceeded in equity to compel the trustee, upon a proper indemnity, to allow the trustee's name to be used by him (the beneficiary) in an action at law (s). In some circumstances, too, the beneficiary might have sued the other contracting party in equity (t), and in such a case the trustee had to be a party to the action, because "if this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by

(p) Cf. *Balsh v. Hyham* (1728), 2 P. Wms. 453, 455; 24 E. R. 810.

(q) *Seagrave v. Seagrave* (1807), 13 Ves. 439, 443; 33 E. R. 358, 360. There is authority that even at common law a release was ineffective if, to the knowledge of the third party, it was given to him by the trustee in fraud of the beneficiary. *Payne v. Rogers* (1780), 1 Dougl. 407; 99 E. R. 261; *Bannerman v. Radenius* (1798), 7 T. R. 663, 669-70; 101 E. R. 1186, 1190; *Legh v. Legh* (1799), 1 B. & P. 447; 126 E. R. 1002; *Jones v. Herbert* (1817), 7 Taunt. 421; 129 E. R. 168; *Innell v. Newman* (1821), 4 B. & Ald. 419; 106 E. R. 990; *Gibson v. Winter* (1833), 5 B. & Ad. 96, 103-4; 110 E. R. 728, 730-1.

(r) Cf. *Balsh v. Hyham* (1728), 2 P. Wms. 453; 24 E. R. 810.

(s) *Foley v. Burnell* (1783), 1 Bro. C. C. 274; 28 E. R. 1125; *Fletcher v. Fletcher* (1844), 4 Ha. 67; 67 E. R. 564.

(t) *Ante*, p. 427, n. (s).

persons claiming under him as assignee for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied (u). Under the modern practice the third party may sue the promisor, joining the trustee as a co-plaintiff if he will consent (x), but if he will not after a tender of an indemnity against costs (y), then joining him as a defendant (z).

(b) *Other Contracting Party Proceeding Against Beneficiary.* Where the contract is executory on the trustee's side the other contracting party may desire to sue the beneficiary directly. This he may do within the limits of the doctrine of subrogation. This doctrine will enable him to stand in the shoes of the trustee in respect of any right to an indemnity which the trustee may have (a) against the beneficiary personally (b); and to the extent of the trustee's right (c), to recover against the beneficiary directly. Moreover, if the trustee becomes bankrupt, the right of indemnity will pass to the trustee in bankruptcy, but the proceeds will not form part of the assets available to the general creditors, but will be earmarked for payment to the other party (d).

§ 156. How the Existence of a Trust is Established

The next question for our consideration is how the existence of a trust of a contract is established. As we have seen a party to a contract may be a trustee for a third party (i) by reason of an *ex post facto* declaration of trust; or (ii) *ab initio*. He may be a trustee *ab initio* (a) because precedently to entering into the contract he stood in a fiduciary relation to the third party and accordingly entered into the contract in a fiduciary capacity; or (b) because it appears from the contract itself or from his own declaration made contemporaneously with the making of the contract that he entered into the contract as a trustee. Case (b) requires special examination.

(u) *Harmer v. Armstrong*, [1934] Ch. 65, *per* Lord Hanworth, M.R., 83.

(x) R. S. C., Ord. XVI, r. 11.

(y) *Johnson v. Stephens*, [1923] 2 K. B. 857, 860-861.

(z) *Vandepitte v. Preferred Accident Insurance Corporation*, [1933] A. C. 70, 79; *Harmer v. Armstrong*, [1934] Ch. 65.

(a) *Re Johnson* (1880), 15 Ch. D. 548; *Re Blundell* (1890), 44 Ch. D. 1.

(b) *Re Richardson, Ex parte St. Thomas's Hospital*, [1911] 2 K. B. 705; *Hemming v. Maddick* (1871), L. R. 7 Ch. 395.

(c) *Re British Power Traction and Lighting Co., Ltd.*, [1910] 2 Ch. 470.

(d) *Re Richardson, etc.*, *supra*; *Liverpool Mortgage Insurance Company's Case*, [1914] 2 Ch. 617, 633, 640-1. The references in Scrutton, J.'s judgment in the latter case and in *Anglo-Baltic and Mediterranean Bank v. Barber & Co.*, [1924] 2 K. B. 410, and *Hood's Trustees v. Southern Union Insurance Co.*, [1928] Ch. 793, to *Re Richardson*, do not appear to affect the validity of that decision as an authority for the proposition in support of which we have cited it.

It may be observed that the conception that one party to a contract should be a trustee of it for a third person involves more than that it should be contemplated that the third person should in fact be benefited by the performance of the contract (e). It further involves that the alleged trustee *should be under an obligation* to the third party to hold the contract for his benefit. As Jessel, M.R., said in the course of the argument in *Re Empress Engineering Co.* (f), "I know of no case where, when A simply contracts with B to pay money to C, C has been held entitled to sue A in equity". And later: "A being liable to B, C agrees with A to pay B. That does not make B a *cestui que trust*". The additional element of obligation on the part of the alleged trustee which is necessary to the constitution of a trust is indicated by Cotton, L.J., in the course of his judgment in *Gandy v. Gandy* (g): "if the contract, although in form it is with A, is *intended to secure* (h) a benefit to B, so that B is *entitled to say he has a beneficial right* (h) as *cestui que trust* under that contract; then B would, in a Court of equity, be allowed to insist upon and enforce the contract".

If, indeed, the contract should in clear terms declare that one person is a party to it as trustee for a third person, there will be no room for doubt whether a trust has been created, nor will there be if the alleged trustee makes in clear terms a contemporaneous unilateral declaration that he contracts as trustee for a third person. But where there is no such clear declaration by the alleged trustee, and the contract, while referring to the third party, does not clearly declare that a trust in his favour is being constituted, how does the matter stand? In such a case whether a trust has or has not been created is a question of the intention either of the party or parties whose declared will constitutes the contract or of the alleged trustee. This intention is to be ascertained having regard to the words used, the terms of the contract as a whole, and the surrounding circumstances so far as relevant (i).

(e) *Re Sinclair's Policy*, [1938] Ch. 799, 802-3.

(f) (1880), 16 Ch. D. 125, 127.

(g) (1885), 30 Ch. D. 57, 67.

(h) These italics do not appear in the original report.

(i) See s. 55, p. 148, *ante*. In *Royal Exchange Assurance v. Hope*, [1928] Ch. 179, Tomlin, J., said (p. 185): "I think it plain that a third party, who is named in a contract as somebody to whom payment is to be made, is *prima facie* not entitled to sue under the contract, or to make any claim, directly or indirectly, in respect of it. On the other hand, it may be that by reason of the construction of the contract, or the special circumstances in which the contract is entered into, the true effect of the contract is that one of the contracting parties is contracting as trustee for the third party . . ."

Proof of Trust Intention. In evaluating the authorities on what is sufficient to indicate an intention that a party to a contract is to be a trustee of his rights under it for a third party, the change in the attitude of the Courts to the general question of what is a sufficient indication of a trust intention must be borne in mind. The earlier authorities seem to indicate an inclination in the Courts to discern a trust on the most slender evidence; but in the modern cases the view indicated is that whether a trust was created is a matter of intention to be affirmatively proved by those who contend for it. The change is clearly exhibited in the cases on precatory trusts. The older view with respect to them was that *prima facie* words expressive of a desire, wish, recommendation, hope or confidence that a donee would use property in a particular way were to be regarded as imperative and taken to impose a trust on him (*k*). The modern view is precisely contrary to this. Such words are not now taken to impose a trust unless it is otherwise clear that a trust was intended. "If we were only to be guided by the earlier authorities", said Lopes, L.J., in 1895 (*l*), "there would be strong ground for saying that this would be a precatory trust; but it seems to me perfectly clear that the current of decisions with regard to precatory trusts is now changed, and that the result of the change is this, that the Court will not allow a precatory trust to be raised unless on the consideration of all the words employed it comes to the conclusion that it was the intention of the testator to create a trust."

A similar change is apparent in the cases dealing with trusts of contracts. The earliest is *Tomlinson v. Gill* (*m*), but little can usefully be said about the evidentiary aspects of this case, for the facts are only briefly stated in the report. *Gregory v. Williams* (*n*), in 1817, is, however, reported in detail. In view of its date it is not surprising that it should prove to be a case in which the Court discerned a trust on very slight evidence. If the Courts would to-day accept as sufficient proof of a trust the measure of evidence which satisfied Sir William Grant, M.R., one might well state the law to be that proof of a promise by A to B to do something for C is, without more, proof that B is a trustee for C. But, as we have seen, the Courts do not to-day infer a trust merely because a third party is mentioned in the contract; reasonable evidence that a trust was

(*k*) *Eaton v. Watts* (1867), L. R. 4 Eq. 151, 155, *per* Stuart, V.-C.

(*l*) *Re Hamilton*, [1895] 2 Ch. 370, 374.

(*m*) (1756), Amb. 330; 27 E. R. 221.

(*n*) 3 Mer. 582; 36 E. R. 224.

intended must be adduced before a trust will be held to be established. As Lord Wright said in *Vandepitte v. Preferred Accident Corporation* (o), "the intention to constitute the trust must be affirmatively proved . . .". The last-mentioned case concerned a policy of motor accident insurance containing a clause in which the insurer undertook to cover, in addition to the insured, *inter alios* persons driving the car with the insured's permission. In other words, this clause in the policy was simply a promise by A to B to benefit C. There were no other relevant circumstances from which a trust could be inferred and the Privy Council accordingly held that a trust was not made out.

It may not be without significance that most of the cases in which, in the absence of a direct statement of intention, the Courts have held that a trust has been established have been cases where the trustee was entitled to demand performance of the promise which he held in trust without himself being under any obligation to render any performance in return (p). Thus in *Lloyd's v. Harper* (q) the promise was a guarantee upon an executed consideration. In *Les Affréteurs Réunis S. A. v. Leopold Walford (London), Ltd.* (r), while the main contract was in its inception executory on both sides, the particular promise affected by the trust was unconditional and in terms called for immediate performance.

On the other hand a series of cases (s) in which it was unsuccessfully contended that a person had taken out a life insurance policy as a trustee for a third party illustrates the reluctance of the Courts to infer a trust from circumstances where the contract imposes future liabilities upon the trustee which he must discharge as a condition of requiring performance of the promise alleged to be held by him in trust. With these cases may be contrasted *Royal Exchange Assurance v. Hope* (t). There a person had taken out a single premium policy on his life, the policy expiring on July 31, 1926, and had assigned it to a third party. Later he agreed with the insurer for an extension of three months in consideration of a further single

(o) [1933] A. C. 70, 79-80; *Re Schebsman*, [1943] Ch. 366, 370.

(p) Cf. *Re Engelbach's Estate*, [1924] 2 Ch. 348, 355; *Re Webb*, [1941] Ch. 225, 238. In the latter case Farwell, J., found sufficient indication of a trust notwithstanding that the contract imposed a recurring obligation (to pay insurance premiums) upon the trustee.

(q) (1880), 16 Ch. D. 290.

(r) [1919] A. C. 801.

(s) E.g., *Re Engelbach's Estate*, [1924] 2 Ch. 348; *Re Clay's Policy*, [1937] 2 A. E. R. 548; *Re Sinclair's Policy*, [1938] Ch. 799; and *Re Foster*, [1938] 3 A. E. R. 357. See *ante*, p. 430.

(t) [1928] Ch. 179.

premium. Tomlin, J., and the Court of Appeal held that the assured entered into this agreement for an extension as trustee for the third party (u).

§ 157. The Beneficiary

It is a general principle of the law of trusts that the beneficiaries under the trust should be indicated with reasonable certainty (x). This does not entail that they should be individually identified at the time when the trust is created. They are indicated with sufficient certainty if they are defined as members of a reasonably limited class. In *Lamb v. Vice* (y) this class was the suitors in the Palace Court who might be prejudiced if the Court official giving the bond should fail in the discharge of his duties. In *Lloyd's v. Harper* (z) the class comprised those persons who might from time to time be insured under policies of insurance underwritten by the guarantor's son. It will be observed that in both of these cases the trust was for members of a class which might comprise different individuals at different times.

It is also a principle of the law of trusts that a trust may exist for the benefit of a person not yet born (a). By analogy it is submitted that there is no reason why the beneficiary should not be a company about to be incorporated; and whether the beneficiary be an unborn child or a company about to be incorporated there is no reason why the subject-matter of the trust should not be a contract.

It is sometimes said, indeed, that *Re Northumberland Avenue Hotel Co.* (b) is against the view that a trust of a contract may be validly created in favour of a company not yet incorporated. In that case Wallis entered into a contract with Doyle "as trustee for and on behalf of an intended company, to be called the Northumberland Avenue Hotel Co., Ltd.", whereby Wallis was to lease certain land to the company. The company was duly incorporated and afterwards went into liquidation. Wallis, in the meantime, had become bankrupt and his trustee in bankruptcy and other interested parties took out a summons in the liquidation asking that they might be admitted as creditors for damages for breach of the contract by the company. The Court of Appeal regarded the case as "in substance an action for damages for breach of an agreement

(u) Cf. *Re Webb*, *cit. supra*.

(x) *Knight v. Knight* (1840), 3 Beav. 148, 172; 49 E. R. 58, 68.

(y) (1840), 6 M. & W. 467; 151 E. R. 495. See *ante*, p. 428.

(z) (1880), 16 Ch. D. 290.

(a) *E.g.*, *Re Bowles*, [1902] 2 Ch. 650.

(b) (1886), 33 Ch. D. 16.

alleged to have been entered into between Mr. Wallis . . . and the company (c); and they held that no such contract had been made. It was impossible to regard Doyle as an agent, for his alleged principal was at the relevant time non-existent; and any acts of part performance by the company when it came into existence were to be regarded as done in the mistaken belief that the original contract was binding on it, and not with the intention of entering into a new contract on the same terms as the old. It appears, therefore, that this decision, being in effect merely a decision on common law principles in a common law claim for damages for breach of contract, is in no way inconsistent with the validity of the view that a person may hold contractual rights in trust for a company not yet incorporated, so that the company, on incorporation, will have a right to take advantage of the trust. Support for the view that this is so is afforded by the judgment of Chitty, J., who heard the application in the first instance (d). He said "that if Doyle contracted as agent for the company, then as the company was not at that time in existence . . . the agreement could not be ratified by the company; that *if he contracted as trustee, then, whatever claims he might have against the company if they took the benefit of the agreement* (e), there was no contract between the company and Wallis".

In such a case it is of course clear that the company, on being incorporated, would have a choice whether or not to adopt the position of beneficiary (f). And doubtless, just as acting on the contract in the mistaken belief that it was binding on the company immediately on incorporation would not amount to making a new contract, so likewise it would not amount to electing to accept the position of beneficiary. But provided the company's intention to accept the benefit of the trust is clear, there seems no ground upon which that intention should be regarded as ineffective.

It should be noticed that the analogy of a trust for an unborn child with a trust for a company not yet incorporated, while close, is not complete. If one of the child's parents is ascertained, then the child itself is ascertained with reasonable certainty, and it must come into existence within the lifetime of that parent, or (if the

(c) Cotton, L.J., p. 19.

(d) At p. 18.

(e) The italics are not in the original.

(f) *Hardoon v. Belilos*, [1901] A. C. 118, 123.

parent is the father) shortly after. Care must therefore be taken in drawing a contract with a trustee for a company yet to be incorporated to ensure that the identity of the company is defined with sufficient certainty, and that the time within which it can take advantage of the trust is limited to comply with the rule against perpetuities.

§ 158. Distinction Between a Trust of a Contract and a Contract to Create a Trust

It should be observed that cases such as have been discussed in this chapter—cases of trusts of contracts—are quite distinct from cases of contracts to create trusts, and in divers ways these two kinds of contracts produce different legal consequences. For example, a trust of a voluntary covenant is perfectly good and the beneficiary has an enforceable claim. But a voluntary covenant to create a trust vests no rights of any kind in the contemplated beneficiaries, unless they are parties to the deed. Even a contract for valuable consideration to create a trust vests in the contemplated beneficiaries as such (unless they are issue of the marriage in the case of marriage articles (g)) no rights which they can enforce of their own initiative. Thus in *Colyear v. Mulgrave* (h) a father, who had four natural daughters and a legitimate son, entered into an agreement with his son, evidenced by certain deeds, whereby the father covenanted to transfer a fund to a trustee for his natural daughters, and the son covenanted to pay the debts of the father. A bill to enforce this agreement was filed by one of the natural daughters, but her application was refused by Lord Langdale, M.R., on the ground that there was no declaration of trust of the fund, but simply an executory contract, to which the plaintiff was no party, to create a trust. In such a case, however, should a party to the contract sue for specific performance, the Court, if it enforces the contract at all, will do so for the benefit of all persons concerned, and not merely for the benefit of the particular plaintiff (i).

Although the distinction between a contract to create a trust and a trust of a contract is clear, there is no reason why there should not be a trust of a contract to create a trust. If A covenants with B to pay B a sum of money to be held by B upon trust for C, that, *prima*

(g) *Re D'Angibau* (1880), 15 Ch. D. 228, 242; see p. 383, *ante*.

(h) (1836), 2 Keen 81; 48 E. R. 559.

(i) *Davenport v. Bishopp* (1846), 1 Ph. 698; 41 E. R. 793.

facie, vests no rights of any sort in C; but if, as may be the case, B is a trustee of the covenant for C, C will of course have an enforceable claim (k).

(k) *Fletcher v. Fletcher* (1844), 4 Ha. 67; 67 E. R. 564. *Colyear v. Mulgrave* (*cit. supra*) is sometimes thought to conflict with this case. *Colyear v. Mulgrave* was, in effect, a contract upon valuable consideration by A with B to vest property in X upon trust for C. On the principle of *Fletcher v. Fletcher* B could be a trustee of this contract for C. The possibility of this, however, was neither urged upon nor considered by the Court in *Colyear v. Mulgrave*. It can hardly be said, therefore, that that case, as an authority, is in conflict with *Fletcher v. Fletcher*. Rather *Fletcher v. Fletcher* is a qualification or addition to the principle applied in *Colyear v. Mulgrave*

CHAPTER XVIII

ASSIGNMENT

§ 159. Substitution of Other Persons for the Original Parties to the Contract

We have seen that it is an approximately true statement of the common law position that contractual rights and obligations exist originally and *ab initio* exclusively between the parties to the contract (a). To this general principle the common law rules as to agency may be regarded as constituting in some sense an exception. In particular the rules as to ratification may be so regarded. By virtue of these rules, a stranger who is not originally a party to the contract may become retrospectively a party to it so as to acquire rights and obligations thereunder. Thus, if A, having no authority to contract on behalf of B, nevertheless does so, B may, if he thinks fit, subsequently ratify and adopt that unauthorised act of his professed agent, and thereupon the contract has the same validity and operation as if the making of it in B's name had been duly authorised by him (b).

Furthermore, equity, as we have seen (c), developed an important exception to the general principle of the common law by the use of the trust. In equity there is nothing to prevent a party to a contract from making it as a trustee for a third person who at common law is a stranger thereto. Thus A may covenant with B, as trustee for C, to pay £1,000 to B. In such a case B holds this covenant in trust *ab initio* for a stranger to the contract. The contractual right created by the contract is vested at law in B, a party to the contract; but the benefit of that right is vested in equity in C, a stranger to the contract.

Subject to such exceptions, the rule is general that the *vinculum juris* created by a contract exists originally and *ab initio* between those persons alone between whom the contract is made. Derivatively, however, other persons may become substituted for the original parties. The *vinculum juris*, when it has once become

(a) See pp. 382 *et seq.*, *ante*.

(b) See pp. 401 *et seq.*, *ante*.

(c) See Chap. XVII, pp. 424 *et seq.*, *ante*

constituted as between the original contracting parties, may in divers ways become transformed in respect of the persons who are parties thereto. Either or both of these parties may be changed, although the contract remains the same in respect of its contents. A bank-note, for example, represents a contract by the bank to pay £5 on demand. The original parties to this contract are the bank and the person to whom the note was first issued by the bank, and it is between those persons only that the *vinculum juris* so created originally exists. It is true that the note professes on the face of it to be a promise to pay £5 not to any single and determinate person, but to the *bearer* of it; that is to say, to any person who presents it for payment. But a bank-note is not for this reason to be regarded as a contract made between the bank and the world at large, or between the bank and the unknown person who in the future shall present it for payment. Still less is it a multitude of contracts made between the bank and every person through whose hands the note passes in the course of its currency. It is a single contract made, like all other contracts, between determinate individuals—namely, the bank and the first holder of the note. The rights of all subsequent holders are derivative merely. They represent the substitution of new parties to the contract. When I receive a bank-note from the bank and pay it to a shopkeeper for goods sold, the legal nature of the transaction is that I have first made a contract with the bank, and have then substituted the shopkeeper for myself as a party thereto. The original *vinculum juris* remains, but it has been modified in respect of the identity of the persons between whom it exists.

This process of substitution is to be contrasted with and distinguished from the declaration by a party, subsequently to the making of the contract, of a trust of it. Substitution means that the original party drops out of the contract and is replaced by the third person. The original party ceases to be a party and the third person becomes a party in his stead. Declaration of trust, on the other hand, implies that the party declaring the trust continues as a party to the contract, but undertakes to hold his rights as party for the third person. Substitution and declaration of trust are ordinarily mutually exclusive, although, as we shall see (*d*), it appears that before the Judicature Act, 1873, they coincided in one special case.

(*d*) See pp. 464–5, *post*.

§ 160. Methods of Substitution

The *substitutio personarum* whereby contractual rights and obligations originally existing between the two contracting parties come subsequently to exist between other persons, one or both of whom were strangers to the contract, occurs in several distinct ways.

Novation. In the first place, it may occur by way of the process technically known as *novation*—a term usefully adopted by the modern language of English law from the *novatio* of the Roman lawyers. Novation is *substitutio personarum* brought about by the mutual consent and agreement of all persons concerned. A contract between A and B is transmuted into a contract between A and C by the agreement of all three persons. By tripartite consent the original contract between A and B is cancelled, and a new contract between A and C to the same effect is substituted for it (*e*). In respect of its contents this new contract is identical with the old, but in respect of the parties it is a different contract. And because this substitution of parties has been effected by means of a new agreement the process is known as novation. Speaking generally, this is the only fully effective method by which one party to a contract can substitute another for himself as the person who is subject to the obligations and liabilities of the contract. He may commonly of his own authority, and without the consent of the other party, substitute another person as the owner of the contractual rights which he possesses under the contract; but he cannot commonly, without the other party's consent, get rid of his own contractual obligations by transferring them even to a stranger who is willing to assume them. In other words, the benefit of a contract may commonly be transferred to a stranger by an act of merely unilateral assignment; but the burden of a contract cannot commonly be transferred to a stranger except by a process of novation. One of the most important and familiar illustrations of novation is to be found in the case of a change in the membership of a firm of partners (*f*). A and B carry on business in partnership for a time, and it is then agreed that B shall retire from the firm and that C shall take his place. At the time of the change certain debts are owing to the old firm, and certain debts are owing by it. In order that the debts so owing to the old firm shall be transformed into debts

(*e*) *Scarfe v. Jardine* (1882), 7 App. Cas. 345, *per* Lord Selborne, L.C., 351; *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660, *per* Collins, M.R., 668; *Lyth v. Ault* (1852), 7 Ex. 669; 155 E. R. 1117.

(*f*) Partnership Act, 1890, s. 17. See Pollock, *Digest of the Law of Partnership* (14th ed.), 56.

owing to the new firm all that is required is an assignment of them by the old firm to the new as part of the assets taken over on the change in the partnership. But in order that the debts owing *by* the old firm shall be transformed into debts owing by the new, more is required than a mere agreement between the two firms. The mere circumstance that, by contract between the old firm and the new, the outstanding liabilities of the old firm are to be met and borne by the new does not in any manner alter the legal position of those debts. They remain the debts of the old firm and of it alone. The creditors cannot sue the new firm in reliance on the undertaking of that firm to pay those debts, for they were not themselves parties to that contract. Nor can the retiring member of the old firm defend himself against the creditors on the plea that the debts have been taken over by the new firm, for no man can by his own act thus rid himself of his contractual obligations (g). What is really required, therefore, is an act of novation—a tripartite agreement whereby the creditors agree to discharge the retiring partner from his liabilities in consideration of his procuring the promise of the new firm to take over and satisfy these liabilities itself and the new firm gives this promise in consideration of the creditors discharging the retiring partner (h). Such an agreement by way of novation may be tacit, and it does not take much (i) to justify the inference of such an agreement from the conduct of the creditors in continuing to deal with the new firm as if it were identical with the old (k). But until and unless *novatio*, express or implied, has taken place there is no *substitutio personarum* effective to discharge the retiring partner from his contractual liabilities by substituting the newly established firm as the debtor in his stead.

Assignment. The second method in which *substitutio personarum* takes place is that of *assignment*. This is the unilateral act

(g) *Attwood v. Banks* (1839), 2 Beav. 192, 196; 48 E. R. 1153, 1155.

(h) *Scarfe v. Jardine* (1882), 7 App. Cas. 345, 351; *Re Head*, [1893] 3 Ch. 426.

(i) *Rolfe v. Flower* (1865), L. R. 1 P. C. 27, 40, 44; *Re Family Endowment Society* (1869), L. R. 5 Ch. 118, *per* Lord Hatherley, L.C., 132; *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660, *per* Cozens-Hardy, L.J., 677.

(k) Nevertheless the caution which fell from Lindley, L.J., in *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32, should not be overlooked. The learned Lord Justice said (p. 53): "The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for payment, especially when requested to do so by their co-debtor, is quite consistent with an intention to look to them as a mere matter of convenience without releasing him. To succeed on this ground, what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred". The italics are not in the original.

of one party to a contract, without or independently of the consent of the other party, in substituting a stranger for himself. The contract being made between A and B, A by his own act substitutes C for himself as a party thereto, whether for all purposes or for some: as when the owner of a promissory note or of a life insurance policy transfers it to some other person. The limits within which such assignments of a contract are permissible, the methods in which they can take place, and their legal consequences will be the subject of later and detailed consideration in the present chapter.

Obligations Running with the Land, etc. A third form of *substitutio personarum* is that which takes place in the case of those contracts which are said, in the technical language of the law, to *run with* land or other property. Contracts are sometimes of such a nature that they do not, as is ordinarily the case, constitute a mere personal relationship between the contracting parties, but are attached to property as incidents thereof, and therefore go with that property into the hands of subsequent owners or possessors thereof, even though those owners or possessors are not the persons by whom the contracts were made. The contract, for example, of a lessee to pay rent for the land, or to keep the buildings thereon in good repair, is not a mere personal contract between him and his landlord. The obligations so created are attached or incident to the leasehold estate itself, and follow it or run with it into the hands of successive owners of the lease. The landlord accordingly is entitled to recover the agreed rent or to enforce the other covenants of the lease not merely against the original lessee who made the contract with him, but against any subsequent owner of the lease.

This *concurrence* of a contract with property to which it relates exists both in respect of contractual rights and in respect of contractual obligations. That is to say, contractual rights may be attached to land or other property as an *accessory* thereto, and the accessory follows and runs with the principal to which it is so attached. Similarly, contractual obligations may be attached to land or other property as an *encumbrance* thereof, and this encumbrance follows and runs with the property encumbered. When contractual rights are thus accessory to and concurrent with any property it is said that the *benefit* of the contract runs with that property, and when contractual obligations are thus an encumbrance upon and concurrent with any property it is said that the *burden* of the contract runs with that property.

The law as to the concurrence of contractual rights and obligations with property is commonly expounded in works on property and we shall not further consider it here (l).

Devolution. We have now indicated three different methods of *substitutio personarum* whereby contractual rights or obligations pass derivatively from one person to another—namely, *novation* by the consent of both parties, *assignment* by the unilateral act of one of the parties, and *concurrence* by the attachment of the contract to certain property with which it runs into the hands of successive owners or possessors who are not parties to the contract. All other methods of substitution may be conveniently classed together under the title of *devolution*. By the act of the law itself, independently of the consent of the parties or of the act of either of them, and independently of the concurrence of contracts with property to which they relate, a contract may on divers occasions pass from the person who made it and devolve upon some other person. The chief example of such devolution by act of the law is that which takes place on the death of a contracting party. Sometimes, indeed, his contracts die with him, the contract being of such a nature that his continued life is an express or implied condition of it (m). But when there is no such condition a contract survives the maker of it, and devolves upon his representatives both in respect of the benefit and the burden of it (n). To this extent a man's contractual rights form part of his assets on his death and are enforceable by his executors or administrators, and, conversely, his contractual obligations must on his death be performed in his stead by those representatives to the extent of the assets available for this purpose. Similarly, on bankruptcy the contracts of the bankrupt which

(l) Although the topic is not considered in detail in this edition the reader may be referred to Sir John Salmond's valuable discussion of it in Salmond and Winfield, pp. 424-445.

(m) *Nokes v. Doncaster Collieries*, [1940] A. C. 1014, 1019; *James v. Morgan*, [1909] 1 K. B. 564; cf. *Kirk v. Eustace*, [1937] A. C. 491.

(n) *Marshall v. Broadhurst* (1831), 1 Cr. & J. 403; 148 E. R. 1480. So far as vested causes of action for breach of contract are concerned s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, provides (with respect to contracts, substantially affirming the common law) that all causes of action subsisting against or vested in a person shall upon his death survive against or for the benefit of his estate; and that where a cause of action in contract survives under this provision the damages recoverable are not to include exemplary damages (see p. 579, *post*), and in the case of a breach of promise to marry they are to be limited to the damage, if any, caused to the estate of the deceased. For the previous law on the latter point see *Chamberlain v. Williamson* (1814), 2 M. & S. 408; 105 E. R. 433, and *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

are not of a personal nature (o) devolve upon the trustee in bankruptcy (p).

We proceed now to deal more particularly with the special subject-matter of this chapter—namely, the assignment of contracts.

§ 161. Assignment

The assignment of a contract is the act in law of one of the parties in substituting some other person for himself as a party thereto, either for all the purposes of the contract or for some of those purposes only. Where, as is commonly the case, the contract is already executed on the part of the assignor, so that he has no longer any obligations thereunder, but possesses merely accrued rights, there is no difficulty in this conception of *substitutio personarum* by way of assignment. The assignor is merely transferring his accrued contractual rights to another person, just as he might transfer his horse or his land. This is so, for example, when the holder of a bank-note delivers it to another person, or when a creditor who has lent money to his debtor assigns the right to receive payment of this debt to another person. This class of case is so common and obvious that there is a tempting simplicity and ease in defining the assignment of a contract as if it was in all cases nothing more than the assignment of a contractual right. This, however, is an illegitimate simplification of the problem. A contract may be, and often is, assigned while it still remains executory on the part of the assignor. That is to say, his own side of the contract may still remain unperformed or not fully performed, and he may therefore have obligations under the contract as well as rights, and such rights as he has may be conditional on the performance of his reciprocal obligations. A builder may contract to build a house for £1,000, and before the house is built or finished he may assign the contract to another builder who is his successor in business. What is the meaning and effect of such a transaction? It does not mean merely that he assigns to his successor in business the right to receive the £1,000 when it accrues, retaining the duty of building the house for himself. On the contrary, the meaning of the transaction is that he substitutes, so far and in such wise as it is possible to do so, the new builder

(o) *Gibson v. Carruthers* (1841), 8 M. & W. 321, 343-4; 151 E. R. 1061, 1070; *Lucas v. Moncrieff* (1905), 21 T. L. R. 683. As to whether a vested cause of action for a breach of a contract of a personal nature committed by the other party against the bankrupt passes to the trustee see *Drake v. Beckham* (1843), 11 M. & W. 315, 319; 152 E. R. 823, 825.

(p) The trustee may, within twelve months after the first appointment of a trustee, disclaim unprofitable contracts. S. 54, Bankruptcy Act, 1914.

for himself as the party to the contract, both for the purpose of building the house and for the purpose of receiving the price of it when built. Such an assignment means that for all such purposes the contract shall be read and shall operate for the future as if the name of the new builder were contained therein instead of the name of the old. He assigns not only his contractual rights, but also his contractual obligations in such a sense and to such effect as is possible in law (q). The conclusion that the assignment of a contract is not to be correctly and adequately defined as amounting to nothing more than the assignment of contractual rights is supported by the consideration that even in the case of an executory contract *remaining to be performed by the assignor he may choose between assigning the entire contract in the sense which we have explained and assigning merely his right to receive the money to be earned by him through his own performance of it.* The builder in the illustration which we have already used, instead of assigning the building contract itself to a successor in business, may merely assign his future right to receive the price of the house, when it has been built, to one of his creditors. In such a case the assignor has substituted his creditor for himself as a party to the contract for the purpose of receiving payment, but not for the purpose of performing the contract by building the house. The assignor remains himself a party to the contract for this purpose. It is for him to perform the obligations of the contract, and for his assignee to obtain the benefit of the payment so to be earned. Such an assignment relates to the benefit of the contract exclusively, and not also to the burden of it. The assignment of a contract is, therefore, the substitution of the assignee for the assignor as a party to it so far as such substitution is intended by the parties and permitted by the law.

How far, then, is such a substitution permitted by the law? This is a question which must be asked and answered separately with respect to contractual rights and with respect to contractual obligations—with reference, that is to say, to the benefit of the contract and to the burden of it.

§ 162. Assignment of Benefit of Contract

First, then, as to the benefit of the contract. The assignment of a contractual right *in personam* stands in a somewhat different

(q) See *Tollhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660, *per* Collins, M.R., 668-669; *British Waggon Co. v. Lea & Co.* (1880), 5 Q. B. D. 149. As to the building contract illustration used in the text cf. *Knight v. Burgess* (1864), 33 L. J. Ch. 727.

position from the assignment of a proprietary right *in rem*. He who sells his horse to another owner does not thereby in any respect whatever alter the legal duties and liabilities of third persons. These persons remain, as before, under a legal obligation not to steal the horse or to injure or destroy it; and it makes no difference to them whether the horse is the property of A or that of B. But it is different with the assignment of a right *in personam* arising out of a contract. By thus substituting another person for himself as the owner of that right the assignor has in some degree altered the nature of the legal obligation of the other party to the contract. That party's contract to pay A has without his own consent been transformed into a contract to pay B. His obligation under a contract of sale to deliver the goods to the buyer has by assignment been transformed into an obligation to deliver them to a stranger with whom he made no contract. If, therefore, the assignee seeks to enforce payment or delivery to himself, it might seem that the other party to the contract should be entitled to say: "I know nothing of you. I never agreed to pay this money to you or to deliver these goods to you. I agreed to pay or deliver to John Doe, and I cannot without my own consent be required to pay or deliver to any other person". And, in truth, by the common law of England, before it had been modified by equity and legislation, this was a good answer to any claim by the assignee of a contract. Contractual rights were enforceable at common law between the original parties to the contract only, and were not by way of assignment and *substitutio personarum* enforceable between strangers to the contract. Modern law, however, has chosen the other way. Contractual rights are now in general assignable (r). But even now this rule is not invariable. There are many cases in which assignment is impossible. For a distinction must be drawn between those contracts in which the obligations of the other party are *personal* in their nature and those in which they are *impersonal*. They are personal when the personality or identity of the party in whose favour they are performed is recognised by the law as of importance to the party who is called upon to perform them. Obligations, on the other hand, are impersonal where the law considers that the personality or identity of the person in whose favour they are to be performed is a matter of indifference to the performing party (s). When the obligation is of a personal nature the corresponding right is not

(r) *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660, 668-9.

(s) *Ib.*; [1903] A. C. 414, 417.

assignable, for an assignment would substantially, and not merely nominally, alter the nature of the obligation undertaken by the contract (*t*). Where, on the contrary, the obligation is impersonal, the corresponding right is assignable, for in the view of the law it makes no real difference to the party bound by that obligation whether he is called on to perform it in favour of the original party to the contract or in favour of a nominee or assignee. In the case of a personal obligation the party bound thereby is permitted to say to an assignee: "I never agreed to do this for you or in your favour. I agreed to do it in favour of him with whom I contracted and with him alone". But in the case of an impersonal obligation modern law does not permit any such plea, the substitution of the assignee for the assignor as the person entitled to performance not being regarded by the law as amounting to any real alteration of the nature of the obligation. A typical example of a contract not assignable because of the personal nature of the obligation involved is a contract to marry. A contract of personal service between master and servant is another illustration of the same principle. The servant cannot assign his contractual right to employment, for the master is entitled to say to his servant: "I agreed to employ you and you alone, and I cannot be called upon to employ your nominee and substitute instead" (*u*). All debts and other pecuniary obligations, on the other hand, are in their nature impersonal, and the corresponding rights are therefore assignable. It can make no practical difference to the debtor whether he is required to pay the original creditor or his assignee. Similarly, contracts for the purchase of goods are commonly contracts of impersonal obligation. The seller must deliver either to the buyer or to his assignee. So long as the time, place, and manner of delivery are unchanged the seller cannot object that the identity of the recipient has been changed by assignment.

§ 163. Assignment of Burden of Contract

We pass now to the consideration of the assignability of a contract, not in respect of the benefit of it, but in respect of its burden. Commonly, as already indicated, contractual obligations are not assignable in the sense that it is possible for a party to the contract so to substitute another for himself as to exempt himself

(*t*) *Tolhurst's Case*, [1902] 2 K. B. 660, 672-3, 680; *Kemp v. Baerselman*, [1906] 2 K. B. 604

(*u*) Cf. *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A. C. 1014.

from liability and to impose it upon that other even though ready and willing to assume it. Such a transaction is commonly possible only by way of novation. There are, however, exceptional cases in which this is possible by way of mere assignment without novation. An example is the transfer of shares in an incorporated company. Such a share is in its true and essential nature nothing more than a contract between the shareholder and the company: a contract by which the shareholder is entitled to certain contractual rights as against the company—namely, the right to receive a certain proportion of the annual profits of the company's business, the right to receive a certain proportion of the realised assets of the company on liquidation, and the right to take part in the management of the company's business. A share in a company is not, like a share in an unincorporated partnership, a proprietary right to the ownership of a certain proportion of the company's property. The property of an incorporated company is owned not by the shareholders but by the company itself, as being a person in law distinct from its shareholders. But the property of a firm is owned in common by the partners themselves. The transfer of a share in a company is therefore in its legal nature the assignment by the shareholder of a contract between himself and the company. But it is an assignment not merely of his rights under that contract, but of his obligations and liabilities also. He effectually substitutes his assignee for himself both with respect to the benefit and with respect to the burden of his contract. The obligation which he so transfers is that of paying the uncalled balance of the amount of his share—the obligation, that is to say, to contribute the share of capital which by his contract he has undertaken to contribute. By the transfer of the share this obligation passes to the transferee and departs from the assignor, subject only to certain contingent liabilities in the event of the insolvency and winding-up of the company (x).

Assignments of this nature, however, in which the substitution of the assignee for the assignor is thus fully effectual to pass not merely the benefit but the burden of the contract are exceptional and anomalous in their nature. In general, *substitutio personarum* by way of mere assignment without novation, although amounting to an effective transfer of the contractual rights of the assignor to the assignee, amounts merely to a delegation to the assignee of the performance of the assignor's obligations.⁶ The assignor merely substitutes the assignee for himself as the person by whom and

(x) S. 157, Companies Act, 1929.

persona. But, on the other hand, in an ordinary contract for the sale of merchandise the seller may assign the entire contract, and not merely his right to receive the price. For his obligation to deliver the goods is impersonal. So long as the goods are in conformity with the contract and are delivered at the right time and place it matters nothing to the buyer whether they are delivered by the seller himself or by his assignee. Therefore the buyer cannot refuse to receive the goods from the assignee and to pay him the price on the plea that the contract was for delivery by the original seller only (b). In such a case the maxim *Qui facit per alium facit per se* is applicable, and the burden of the contract is assignable in the qualified sense already explained.

§ 164. Assignment of Contract Distinguished from Assignment of Property Acquired Pursuant to the Contract

The assignment of a contract is to be distinguished from the assignment of property acquired or to be acquired by the assignor in pursuance of the contract. The first is the assignment of contractual rights, the second of proprietary rights. The assignment of a contract is the substitution of the assignee for the assignor as a party to the contract—the transformation of a contract between X and Y into a contract between X and Z. The assignment, on the other hand, of the property to be acquired by the assignor under the contract is merely the substitution of the assignee for the assignor as the owner of that property, the parties to the contract itself remaining unchanged. The distinction may be illustrated by reference to an agreement for a lease. Such a contract is not assignable by the proposed tenant, for as regards the tenant it is of a personal nature. A house-owner who agrees to let his house to X for a term of years cannot by mere assignment be compelled to grant a lease of it to Y instead, for he is entitled to the benefit of the financial stability of the tenant selected by himself. But although X cannot assign his contract he can assign the leasehold interest to which he is entitled under the contract. And he can do so not only after the lease has been actually granted, but even before it has been granted. By virtue of the agreement for a lease the tenant has presently vested in him, pending the actual grant of the lease, an equitable estate of leasehold. In equity he is in the same position

(b) *Cole v. Handasyde & Co.*, [1910] S. C. 68. It would be otherwise if the vendor were the manufacturer of the goods, the manufacture of which involved special skill, knowledge or supervision. *Jaeger's Sanitary Woollen System Co., Ltd. v. Walker & Sons* (1897), 77 L. T. 180.

in this respect as if the lease had been executed (c). And this equitable leasehold is assignable, notwithstanding that the contract by which it was created is not itself assignable. So far as the contract is concerned there is no assignment—no *substitutio personarum*—and the only obligation of the landlord is to grant a lease to the original tenant who bargained for it. But this tenant, having already assigned the equitable leasehold to his assignee, will hold the legal leasehold so acquired by him in trust for the assignee and can be compelled to transfer it to him. Notwithstanding such a transfer the original tenant will remain liable to the landlord (in default of the assignee) for the payment of the rent and the performance of the covenants of the lease. But if the lease had been granted direct to the assignee in pursuance of an assignment of the contract itself the landlord would have been deprived by such assignment of all recourse against the assignor. The assignee may, indeed, obtain the execution of a lease direct to himself, but in such a case the party named in the contract as the intended lessee must, if required by the lessor, join in the lease so that the lessor may have that party's personal liability as if the lease had been granted to him (d).

With an agreement for a lease may be contrasted in this respect an agreement for the sale of land. Commonly such a contract of sale is impersonal in its nature, and is therefore assignable. If the vendor receives his purchase-money in exchange for his execution of a conveyance, it commonly makes no difference to him whether he is called upon to convey to the original purchaser or to his assignee. The purchaser, therefore, is at liberty to assign the contract itself, substituting the assignee for himself as the purchaser who is entitled to the conveyance (e). He is not restricted, as in the case of an agreement for a lease, to an assignment of the equitable estate which is vested in him by virtue of the executory contract of purchase.

The same distinction between the assignment of contractual rights and the assignment of proprietary rights acquired or to be acquired in pursuance of the contract extends also to the assignment

(c) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9.

(d) *Dowell v. Dew* (1842), 12 L. J. Ch. 158, per Knight Bruce, V.-C., 162; *Purchase v. Lichfield Brewery Co.*, [1915] 1 K. B. 184, 187; *Curtis Moffat, Ltd. v. Wheeler*, [1929] 2 Ch. 224, 237. See also Halsbury, *Laws of England* (2nd ed.), vol. 31, p. 419. As to the position where the party named in the contract as the proposed lessee has since become bankrupt see *Buckland v. Papillon* (1886), L. R. 1 Eq. 477; L. R. 2 Ch. 67.

(e) *Earl of Egmont v. Smith* (1877), 6 Ch. D. 469.

of non-contractual rights—for example, a right of action for damages for a tort. It is well settled that such a right of action is commonly not assignable (f). But notwithstanding this rule it is possible effectually to assign prospectively the damages to be recovered in such an action. Thus in *Glegg v. Bromley* (g) the plaintiff in an action for damages for slander assigned by way of mortgage all sums of money which might be recovered by way of damages in the action. It was held by the Court of Appeal that this was a valid assignment. It is said by Parker, J. (h): “I think that according to the true construction of the mortgage in question the subject-matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action”.

§ 165. Legal and Equitable Assignments

Contractual assignments are distinguishable as being either legal or equitable. A legal assignment is one which passes the legal ownership of the contractual right—the chose in action—from the assignor to the assignee. An equitable assignment is one which merely vests the equitable ownership in the assignee, leaving the legal ownership outstanding in the assignor himself as before. The distinction between legal and equitable ownership which pervades the whole law of property applies to the ownership of choses in action also. A debt or other contractual right may belong to one person in law and to another person in equity, the legal owner holding not in his own right and on his own behalf, but in right and on behalf of the equitable owner and as a trustee for him. The practical importance of this distinction between the legal and the equitable assignment of a chose in action has its source in legal history. The common law, for the most part, resolutely refused to recognise the assignability of choses in action at all, whether contractual or non-contractual in origin (i). At common law a contractual right belonged exclusively to the person who made the contract, and it could not by way of assignment pass from him to any other person. Legal assignments of choses in action were therefore originally unknown. The equitable jurisdiction of the Court of Chancery, how-

(f) Winfield, *Present Law of Abuse of Legal Procedure*, 67-69.

(g) [1912] 3 K. B. 474.

(h) At p. 489.

(i) Holdsworth, *History of English Law*, vol. 7, 532-534; Winfield, *Present Law of Abuse of Legal Procedure*, 44-50.

for the time being in his own name (o). This common law exception to the non-assignability of choses in action was and is of far-reaching importance both legally and commercially. Its detailed consideration, however, is too specialised a matter to be entered upon in a general treatise on contract, and it will not be further investigated here. It will suffice to say that important as this exception was, it nevertheless fell far short of being a general relaxation of the common law principle that a chose in action was not assignable.

It was not until the Legislature intervened that legal choses in action became generally assignable at law. By the Law of Property Act, 1925 (p) (on this point substantially re-enacting provisions originally enacted in the Judicature Act, 1873 (q)) all legal choses in action which are assignable in equity are made assignable in law also, provided that the assignment is in writing and fulfils certain other requirements over and above those necessary for an assignment in equity.

The final result is that, as already stated, there are two different systems of contractual assignment standing side by side. An assignment operates at law to pass the legal ownership of the chose in action to the assignee if in respect of subject-matter and method this assignment fulfils the necessary conditions required for a legal assignment, either by the rules as to negotiability or the Law of Property Act, 1925. If, on the other hand, it fails to fulfil these conditions, but nevertheless conforms to the requirements of an equitable assignment as established by the Court of Chancery, it is effective to vest the equitable ownership of the chose in action in the assignee, and to constitute the assignor a trustee for the assignee accordingly.

The chief practical difference between a legal and an equitable assignment of the chose in action is that, where the assignment is legal, the assignee is entitled, as being the legal owner, to sue in his own name for the enforcement of the rights so assigned to him without making the assignor a party to the action, whereas when the assignment is equitable merely the assignor, as being still the legal owner of the chose in action, must ordinarily be joined as a party to the action. It is immaterial whether the assignor is joined as a

(o) *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* Blackburn, J., 381, approving notes to *Miller v. Race*, 3 Macq. 16, in 1 Smith's Leading Cases (2nd ed.), 259, (6th ed.), 479; see 13th ed., 533-4. See also *Chalmers, Bills of Exchange* (9th ed.), 371-2.

(p) S. 136. See p. 468, *post*.

(q) S. 25 (6).

co-plaintiff with the assignee, or whether he is made a co-defendant along with the debtor. All that the law requires is that the legal owner shall in one way or the other be a party to the proceedings so as to be bound by them, and so as to have an opportunity of defending any interests which he may possess in the matter. The general principle, of application not merely to equitable owners of choses in action but to all other equitable owners, is thus stated by Lord Cave, L.C., in *Performing Right Society, Ltd. v. London Theatre of Varieties, Ltd.* (r): "It was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that in general when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action. . . . If this were not so, a defendant, after defeating the claim of an equitable claimant, might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. . . . No action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case. Subject to these observations, I think that the general rule is still operative" (s).

§ 166. Equitable Assignments

In every assignment of a chose in action, whether the chose in action or the assignment thereof is legal or equitable, there are three persons concerned—namely, the assignor, the assignee, and the third person on whom the obligation lies which corresponds to the right assigned. It is a defect of legal nomenclature that there is no generic term available which can be accurately used to denote this third person. Some term is necessary, however, and the most convenient course is to refer to this third person as the *debtor* or *trustee*. The term "debtor" is appropriate in the case of legal choses in action, and the term "trustee" in the case of equitable choses in action. The third person, indeed, is not invariably either a debtor or a trustee properly so-called, for all choses in action are not included within the spheres of debts and trusts. Inasmuch, however, as those are the commonest and most important kinds of assignable choses

(r) [1924] A. C. 1, 14.

(s) See also *Bowden's Patents Syndicate v. Smith*, [1904] 2 Ch. 86, 91, *per* Warrington, J., and *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K. B. 81.

in action, it is convenient and intelligible to use the expression "debtor" or "trustee" in this generic sense.

Form. An equitable assignment of a debt or contract does not require an instrument in writing, but may be unwritten. Nor does it require to be made by any special form of words which expressly indicate an assignment. Any transaction between an assignor and assignee is sufficient for this purpose, which indicates with reasonable certainty the assignor's intention to transfer his right to the assignee (*t*). A mere order, direction, or request from a creditor to a debtor to pay the debt to a third person will, if so intended and understood, amount to a valid equitable assignment of the debt (*u*). Such an order, direction, or request may, however, have on occasion some other meaning and operation. Instead of being an assignment of the debt it may, for example, be a mere revocable mandate or authority to the debtor to pay the debt to some other person instead of to the creditor, without conferring on that other person any title to the debt. A cheque, for example, is not a partial assignment to the holder of the drawer's current account in the bank on which it is drawn. It is merely an authority to the bank to pay the amount of the cheque to the holder. The holder has no right of action against the bank, and if the cheque is stopped by the drawer or dishonoured by the bank the holder's only recourse is against the drawer himself (*x*). So a bill of exchange drawn by a creditor upon his debtor for the amount of his debt is not an assignment of the debt to the holder of the bill, and this is so even though the bill has been accepted by the debtor. Such acceptance does not transfer the debt to the holder: it merely creates a new contractual obligation between himself and the acceptor to pay the amount of the bill.

May Be Total or Partial. The equitable assignment of a debt may be either total or partial; that is to say, it may relate either to the entire debt or only to part of it. If A owes £1,000 to B, it is possible for B to assign part of the sum to C while retaining the residue for himself; as by giving A a direction in writing to pay C

(*t*) *Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454.

(*u*) *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765; *Brice v. Bannister* (1878), 3 Q. B. D. 569.

(*x*) *Re Swinburne, Sutton v. Featherley*, [1926] 1 Ch. 38.

In the second place, the assignee, by failing to give notice of the assignment to the debtor or trustee, runs the risk of a fraudulent or mistaken act on the part of the assignor in assigning the same chose in action to some other person. When a debt, trust fund, or other chose in action has been thus assigned inconsistently to two or more competing assignees, his title is best who first gives notice of his assignment to the debtor or trustee. As between competing equitable assignees their priority depends not on the relative dates of the assignments, but on the relative dates of the notices received by the debtor or trustee, provided, however, that the later assignee had himself no notice at the time of his assignment that a prior assignment was in force. This general principle as to the effect of a notice on the rival claims of different assignees of choses in action was established by the case of *Dearle v. Hall* (c), and is commonly known as the rule in *Dearle v. Hall* accordingly.

Valuable Consideration, Necessity for. In the case of a legal assignment of a chose in action it is clear law that valuable consideration is not necessary for its validity (d). A man may make a free gift of shares, debentures, a policy of life assurance, a bank deposit, or any other assignable chose in action, no less than of land or chattels, so long as he transfers the legal estate in the property either to the donee himself or to a trustee for him. But how does this matter stand if the assignment is merely equitable? Can a man without valuable consideration bind himself by a transfer of the equitable ownership of a chose in action while the legal title remains outstanding in himself or in some other person? On this question there is much confusion and uncertainty. The answer which is here suggested as correct is as follows: that the equitable assignment of a chose in action requires to be supported by valuable consideration in two cases only—namely, (1) when it is an assignment of future property, and (2) when it is an *incomplete gift* within the rule in *Milroy v. Lord* (e).

The first of these two cases has already been referred to. We have seen (f) that a person may validly assign not merely those choses in action which presently exist and are presently vested in him, but also by way of anticipation choses in action which have

(c) (1823), 3 Russ. 1; 38 E. R. 475. The basis of the rule is not easy to discover. See Ashburner, *Principles of Equity* (2nd ed.), 136–8. The Law of Property Act, 1925, s. 137, extends it to equitable interests in land.

(d) *Harding v. Harding* (1886), 17 Q. B. D. 442.

(e) (1862), 4 De G. F. & J. 264; 45 E. R. 1185.

(f) See p. 461, *ante*.

not yet come into existence—for example, future book debts to be acquired by him in the course of his business. In this respect choses in action do not differ from property of any other kind. But the anticipatory assignment of future property cannot, of course, operate as a present assignment. Nothing can be presently assigned either at law or in equity which does not presently exist and is not presently vested in the assignor. So soon, however, as the property comes into existence the anticipatory assignment operates upon it in equity so as to pass the equitable title to the assignee. In the meantime it operates merely as a contract to assign the property when it does come into existence. But in order that it shall so operate in equity it is necessary, as in the case of all other contracts which call for equitable enforcement, that it shall be supported by valuable consideration. A voluntary assignment of future property, whether chose in action or property of any other kind, is inoperative in equity. It will not be specifically enforced, and it will not automatically affect the title to the property even when it comes into existence. This is so even if the assignment is by deed. In respect of want of consideration, equity draws no distinction in this respect between a deed and any other instrument. A voluntary deed may, of course, contain a covenant to assign the future property when acquired, and, if so, the covenant will be enforceable at law in an action for debt or damages against the covenantor, but it will not for this reason affect the title to the property itself or amount to an assignment of it at law or in equity (g).

The second case in which consideration is necessary for the validity of an equitable assignment is where the assignment amounts to an incomplete gift within the rule in *Milroy v. Lord* (h). In that case the owner of certain bank shares which were transferable only by entry in the books of the bank executed a voluntary deed purporting to assign those shares to a trustee to be held on certain trusts. It was held that the transaction amounted merely to an incomplete gift which would not be enforced and completed in equity. The principle is thus stated by Turner, L.J.: “I take the law of this Court to be well settled that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property

(g) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Milroy v. Lord* (1862), 4 De G. F. & J. 264; 45 E. R. 1185; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Richards v. Delbridge* (1874), L. R. 18 Eq. 11.

(h) (1862), 4 De G. F. & J. 264; 45 E. R. 1185.

and render the settlement binding upon him. He may of course do this by actually transferring the property to the person for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust" (i). *Milroy v. Lord* was a case of assignment of a chose in action. The rule there laid down, however, is general and applies to imperfect gifts of property of any description (k).

Voluntary Assignments. It appears accordingly that an effective voluntary assignment of a chose in action may be made in two methods. The first is that of a declaration of trust, whereby the donor without transferring or attempting to transfer the property to the donee, or to a trustee for him, declares himself to be a trustee for him. The second method is that of a transfer in which the transferor has "done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him". If, however, he has done less than this—if there is still something left undone by him—the transaction is incomplete and inoperative, and equity will not compel the completion of it at the suit of a volunteer who has given no consideration for the transfer. It further appears that where either a transfer or a declaration of trust would be possible, a transfer which has been unsuccessfully attempted will not be rendered effective by being construed as a declaration of trust. Before the Judicature Act, 1873, however, this principle, it would seem, could not have applied where the chose in action was legal. A transfer in such a case, although

(i) (1862), 4 De G. F. & J. at pp. 274-275; 45 E. R. 1189-90.

(k) *Richards v. Delbridge* (1874), L. R. 18 Eq. 11.

a case of a good equitable assignment of a legal chose in action, not expressed to be by way of declaration of trust, and yet valid though without consideration inasmuch as a legal assignment was impossible.

Choses in Action Capable of Legal Assignment by Statute. What shall be said, however, of choses in action which by the Law of Property Act, 1925, or otherwise are now capable of legal assignment? Can there be a good equitable assignment without consideration otherwise than by way of an express declaration of trust? The answer to this question must, it is thought, depend on what is meant by the requirement of *Milroy v. Lord* (q) that the assignor must do all that is necessary to complete his gift. If this rule is to be construed as meaning that he must actually transfer the legal estate, then *cadit quæstio*; for, if so, it is obvious that there can be no such thing as a voluntary equitable assignment. But the rule is capable of another interpretation. It may mean merely that the assignor must do all that is necessary *so far as he is concerned*, even though some act is still necessary on the part of the assignee to obtain the legal estate. In other words, the rule may mean, and it is submitted that it does mean, that a gift is complete when there is no further act required from the donor in order to enable the donee to obtain a legal title to the property. Let us take the case, for example, of a man who is minded to make a gift of shares to his daughter. These shares are transferable at law by the execution of an instrument of transfer in proper form by both transferor and transferee, followed by registration of the transfer in the books of the company. Let us suppose that the donor executes a proper transfer and hands it to his daughter along with the share certificates in order that she may procure the registration of the transfer in her favour. Before registration takes place, is this a complete and binding gift in the way of an equitable assignment of the shares? Or is it, on the contrary, an incomplete and inoperative transaction so that the donor may revoke his gift? It is suggested that the assignment is valid and binding so soon as the assignor has thus done all that it is necessary that he should do in order to pass the property to the assignee. It is true that the legal estate has not yet passed, but this is a matter within the power of the assignee. There is nothing more which it is necessary for the assignor to do, nothing more which a Court of equity will compel him to do in favour of a volunteer. On the same principle it is thought that even since the

(q) (1862), 4 De G. F. & J. 264; 45 E. R. 1185.

Judicature Act and the Law of Property Act the voluntary assignment in writing of a debt (say, a bank deposit) constitutes a valid equitable assignment *inter partes*, although the assignment has not been completed at law by the necessary notice in writing to the debtor. This notice need not be given by the assignor; it may be given by the assignee himself. There is, therefore, no further act required to be done by the assignor, and his gift is complete in equity. On the other hand, if the assignment was oral merely it would, if voluntary, be inoperative even in equity, because in this case the assignor could not be compelled in favour of volunteers to complete his gift by execution of the instrument in writing which is required by statute.

If the foregoing reasoning is correct the result is that an equitable assignment of a legal chose in action capable of legal assignment is valid even without consideration if it is made either (1) by way of a declaration of trust, or (2) by way of assignment if the assignor has done all things necessary to be done by himself in order to enable the assignee to obtain the legal title for himself whether by registration, notice, or otherwise. But, on the other hand, if anything remains to be done by the assignor himself in order that the assignee may obtain the legal estate, the assignment is invalid unless supported by valuable consideration (r).

(r) The authorities on this question are obscure, difficult, and inconsistent. In *German v. Yates* (1915), 32 T. L. R. 52, Lush, J., expressed the opinion that even since the Judicature Act a verbal and voluntary assignment is good in equity. On the other hand, in *Re Westerton*, [1919] 2 Ch. 104, Sargant, J., considered that, apart from the operation of the Judicature Act, consideration was necessary for every equitable assignment of a legal chose in action. In *Glegg v. Bromley*, [1912] 3 K. B., at p. 491, Parker, J., said: "For every equitable assignment, however, there must be consideration". It is observed, however, that the learned Judge was there speaking of equitable assignments of future property. See also the following: *Harding v. Harding* (1886), 17 Q. B. D. 442; *Law Quarterly Review*, xvi, 241; xvii, 90. *Re Williams*, [1917] 1 Ch. 1: "Take the case of shares in a limited company which are only transferable by deed, or the case of Consols which are only transferable at the Bank of England; it is quite clear that a mere letter not under seal in either of those cases purporting to assign the property would not amount to an assignment giving the benefit of the property to the donee. The transaction would not have been complete, the donor would not have done all that he could to perfect it, and the intended gift would have failed" (*per* Cozens-Hardy, M.R., at p. 7). *Re Griffin*, [1899] 1 Ch. 408: Byrne, J., held that the endorsement and delivery of a banker's deposit receipt, without notice to the bank, was a good equitable assignment. "It is, I think, clear that the test is whether anything remains to be done by the donor, not by the donee, and the fact that notice was not given to the bank does not render the gift incomplete" (at p. 411). The view submitted in the text is supported by *Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K. B. 1, where the law is carefully examined by Atkinson, J. See also R. E. Megarry in 59 L. Q. R. 58, and H. A. Hollond, *ib.* 129, and note, *ib.* 208.

§ 167. Legal Assignments

General provision for the assignment of choses in action at law was made by the Judicature Act, 1873 (s), which on this point is substantially re-enacted by the Law of Property Act, 1925 (t), in the following terms: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (i) the legal right to such debt or thing in action; (ii) all legal and other remedies for the same; and (iii) the power to give a good discharge for the same without the concurrence of the assignor."

As to this enactment there are the following observations to be made:—

1. Notwithstanding the generality of its language it does not make any chose in action assignable at law which was not already assignable in equity in accordance with the principles theretofore established. A right of action for damages for a tort, for example, is a legal chose in action; but it was not in general assignable in equity, and it remains to the same extent unassignable at law. In *Torkington v. Magee* (u) Channell, J., says: "I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable'."

2. The Law of Property Act does not supersede the provisions either of the common law or of any other statute whereby certain choses in action are specifically made assignable at law. Negotiable instruments, for example, are assignable at common law, and the Law of Property Act has no application to them in this respect. Similarly, shares in a company are assignable at law under the provisions of the Companies Act, 1929; marine policies under the Marine Insurance Act, 1906; and bills of lading under the Bills of Lading Act, 1855.

3. If any assignment would have amounted to a good equitable

(s) S. 25 (6).

(t) S. 136.

(u) [1902] 2 K. B. 427, 430; *Tolhurst's Case*, [1902] 2 K. B. 660, 670, 676-7.

assignment before the Judicature Act, it is still capable of operating as such, even though it fails to conform to the requirements of a good legal assignment under that Act: for example, an oral assignment, or an assignment not perfected by notice in writing. In the words of Lord Macnaghten in *Brandt's Sons & Co. v. Dunlop Rubber Co.* (x): "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree." The only qualification of this rule relates to equitable assignments without consideration. The fact that a legal assignment is now possible may in certain cases, as already indicated, transform into an imperfect and therefore inoperative gift an equitable assignment which before the Act would have been perfect and enforceable.

4. A legal assignment under the Act must be in writing signed by the assignor. An equitable assignment, as we have seen, may be oral merely. The equitable doctrine, however, as to what words are sufficient to constitute an assignment remains in full force as to legal assignments.

5. The notice required in the case of a legal assignment differs in two respects from that which is required when the assignment is equitable. In the first place, the notice must be in writing under the Act, whereas a verbal notice is enough in equity. In the second place, in the case of a legal assignment the notice is an essential element in the assignment itself. For the assignment takes effect upon the legal title only from the date of the notice. In the meantime the assignment operates in equity merely. An equitable assignment, on the contrary, is complete and operative as between assignor and assignee without any notice at all. The notice is required merely in order to secure the assignee's title against the act of the assignor in receiving payment from the debtor or in making an inconsistent assignment to another person.

6. The statute does not impose any limit of time within which the necessary notice of assignment must be given. It may be given, therefore, at any time before the commencement of the action in which the assignee sues in his own name in reliance on a legal assignment (y).

7. The statute does not require the notice to be given by any particular person. It may be given, therefore, either by the assignor or the assignee, and it may be given after the death of either of them by his personal representatives (y).

(x) [1905] A. C., at p. 461.

(y) *Bateman v. Hunt*, [1904] 2 K B 530.

8. Where a chose in action has been assigned in writing first by A to B and then by B to C, the requisite notice of both assignments may be given by C, the last assignee, or by his personal representatives after his death, so as to transform these equitable assignments into assignments at law and enable the last assignee or his executor to sue the debtor in his own name (z).

9. Under the statute an assignment must be "absolute", "not purporting to be by way of charge only". The precise meaning of this provision is still a matter of some uncertainty. It is settled, however, that the assignment of the entire debt or other chose in action is none the less absolute within the meaning of the Act, because it is by way of mortgage (that is to say, a transfer with the right of redemption) or by way of trust, even though the trust is in favour of the assignor himself (a).

It is also settled that a partial assignment where the part so assigned is uncertain in amount is not absolute within the meaning of the Act, but constitutes merely an equitable charge (b). Probably the same rule applies even to the partial assignment of a definite portion of the entire debt or other chose in action. In other words, although a creditor may make a legal assignment of the entire debt so as to enable the assignee to sue for it in his own name, it is probable that he cannot at law divide his debt into two or more portions so as to expose his debtor to two or more actions at law by different assignees. On this question, however, the authorities are conflicting (c).

§ 168. Legal Assignments Otherwise than under the Law of Property Act, 1925

Apart from the Law of Property Act, the legal assignment of choses in action is permitted in special cases by the common law and by statute. For example:—

1. Negotiable instruments are assignable at common law, in consequence of the recognition of mercantile custom as derogating

(z) *Bateman v. Hunt*, [1904] 2 K. B. 530.

(a) *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765; *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190; *Tancred v. Delagoa Bay Co.* (1889), 23 Q. B. D. 289; *Comfort v. Betts*, [1891] 1 Q. B. 737; *Fitzroy v. Cave*, [1905] 2 K. B. 364; *Bank of Liverpool v. Holland* (1926), 43 T. L. R. 29.

(b) *Jones v. Humphreys*, [1902] 1 K. B. 10.

(c) *Brice v. Bannister* (1878), 3 Q. B. D. 569; *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765; *Re Jones* (1883), 22 Ch. D. 782; *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190; *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; *Bank of Liverpool v. Holland* (1926), 43 T. L. R. 29; *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K. B. 81.

from the general rule of the common law in respect of choses in action (*d*).

2. Shares in companies are assignable at law by virtue of the Companies Act, 1929, which provides that all such shares shall be transferable in such manner as is prescribed by the regulations of the company (*e*). The usual method is an instrument of transfer signed by both parties and registered in the books of the company.

3. Stock in the public funds is assignable at law by entry of the transfer in the books of the Bank of England (*f*).

4. Bills of lading are by the Bills of Lading Act, 1855, assignable by endorsement and delivery so as to vest in the assignee both the rights and liabilities of the contract of affreightment, as if that contract had been made between the shipowners and the assignee himself. Before this Act, although a bill of lading was assignable by the law merchant, so as to pass the property in the cargo to the assignee, such an assignment did not at the same time transfer the benefit or burden of the contract of affreightment. The contract, that is to say, did not run with the property.

5. Policies of marine insurance are assignable at law under the Marine Insurance Act, 1906, "by endorsement thereon or in other customary manner" (*g*). Such a contract does not automatically run with the property insured, *i.e.*, the benefit of it does not belong, without assignment, to the successive owners of that property for the time being.

6. Policies of life assurance are assignable at law in the manner prescribed by the Policies of Assurance Act, 1867 (*h*).

§ 169. Assignment of Choses in Action Subject to Equities

Having now considered the cases in which and the methods by which a contract or other chose in action can be assigned at law or in equity it remains to consider the nature and incidents of the title so acquired by the assignee.

In general he can acquire no better title than the assignor himself possessed. *Non dat qui non habet*. A man cannot commonly assign to another a better right than he has himself. It follows, therefore, that in general the assignee of a chose in action is subject, in endeavouring to enforce his right against the debtor or trustee, to

(*d*) See p. 457, *ante*.

(*e*) S. 62.

(*f*) National Debt Act, 1870, ss. 22, 23.

(*g*) S. 50 (3).

(*h*) Ss. 1-3.

be met by any defence which the debtor or trustee might have raised against an action brought by the assignor himself. And this is so whether the assignment is legal or equitable; whether the assignor sues in his own name or in the name of the assignee. And it is immaterial whether the assignee, when he took his assignment, had or had not any notice of such a defect in his assignor's title; and whether he did or did not give valuable consideration for the assignment. Such a rule in its general form is clearly required in justice to the debtor or trustee. For a party to a contract should not be put by an assignment of the contract to another party, without the former's consent, in a worse position than that in which he would have been if no such assignment had taken place.

This rule is commonly expressed by saying that the assignee of a chose in action takes it "subject to all equities" by which it is affected. This phrase, though convenient and authoritative, is logically inaccurate, for the term equities in its proper sense means an equitable, as opposed to a legal, claim or defence, whereas the rule now under consideration is not limited to equities in this sense. The defences to which the assignee of a chose in action may thus be exposed in his endeavour to enforce his rights are not necessarily equitable merely, but are usually legal in their nature. The phrase, however, has its historical origin in the fact that choses in action were originally assignable only in equity. The defences in question are those defences, whether legal or equitable in their nature, which a Court of equity would enable the debtor or trustee to avail himself of as against an assignee of the chose in action.

Defences Available Against Assignee. The rule as to the assignment of choses in action subject to equities may be thus illustrated. If the contract or other chose in action is void, voidable, or unenforceable as against the assignor, whether for fraud, error, illegality, want of consideration, want of contractual capacity, or any other reason, it is equally void, voidable or unenforceable in the hands even of an assignee for value and in good faith without notice of any such defect of title. In this respect the assignee of a voidable contract is in an essentially different position from the assignee, not of the contract itself, but of property acquired by virtue of the contract (*i*). If X by fraud induces Y to sell and deliver a chattel to him, and X thereafter resells the chattel to Z, who purchases it in good faith without knowledge that it has been

(i) See p. 454, *ante*.

procured by his vendor under a voidable contract, Z obtains a perfectly good title to the chattel. It is too late now for Y to rescind the contract and recover from the sub-purchaser the chattel with which he was so induced by fraud to part. For the voidable title of X has been transformed into a perfect title in the hands of Z, and is no longer subject to any equities in favour of the person so defrauded. In order to recover the chattel from Z it would be necessary for Y to prove not that his title was merely voidable for fraud, but that it was wholly void, so that no property had passed under it to the purchaser at all. It is quite otherwise, however, with the purchase of a chose in action. If Z had purchased not a chattel procured by fraud but the benefit of an executory contract procured by the same means, the other party to that contract could have rescinded it for fraud not merely as against the original contractor, but also as against his assignee (*h*). So also if a debt has been assigned and the debtor before the assignment, or even after the assignment but without notice of it, has paid the debt to the original creditor or has entered into some new contract with him whereby the debt has been discharged, the assignee, though he has purchased the debt in good faith and for value, will get no title to it; for in an action brought by him for the recovery of it the debtor will be able to plead payment or discharge just as he might have raised the same defence in an action brought by the original creditor himself. It was the business of the assignee before he purchased the debt to inquire from the debtor whether and to what extent it was still owing. And this is so even if the debt is secured by a mortgage. He who purchases such a security or takes a sub-mortgage of it acquires a chose in action, and acquires it subject to equities whether known or unknown. He takes the mortgage, therefore, subject to the state of accounts between the mortgagor and mortgagee at the time when notice of the assignment was given to the mortgagor.

Set-off or Cross-claim. The foregoing illustrations refer to defences or equities which are, so to speak, inherent in the very chose in action itself. What shall be said, however, of defences or equities which do not thus pertain to the very subject-matter of the assignment but are merely collateral, such as a set-off or cross-claim possessed by the debtor against the assignor? If A owes B £100 on one account, and B owes A £20 on another account, and

(*h*) See p. 273, *ante*.

the debt of £100 is assigned to C, can C recover the whole £100 from A, or can A defend himself to the extent of £20 by setting off against C the cross-debt so owing to him by B? Or, on the contrary, must A pay in full his debt of £100 to the assignee of it, and content himself with recovering the £20 from B, who owes it?

Whether cross-claims are available equities in the assignment of a chose in action is a question to which no simple and general answer can be given, for there are distinctions to be drawn. It is certain that in many cases the answer is in the affirmative, but there is no invariable rule to this effect. It is settled, for example, that a claim for unliquidated damages not arising from a breach of the very contract assigned cannot be used as a defence to an action by an assignee of that contract. Thus in *Stoddart v. Union Trust, Ltd.* (1), the assignee of the purchase-money due under a contract of sale sued the vendor, who pleaded as a defence a claim for damages which he possessed against the assignor for inducing him by fraud to enter into the contract. It was held that no such defence was available as against the assignee. The defendant did not seek to rescind the contract on the ground of fraud (a course which he could have taken even as against the assignee himself); on the contrary, he adhered to the contract, but sought to set off against moneys owing by him under it to an assignee a claim for damages not arising under the contract itself but *aliunde*. On the other hand, a claim for damages for the breach of the very contract assigned can be set off against the claim of an assignee for moneys payable under the contract—at all events, if the breach occurred before the debt so assigned had become due and payable (2).

As to cross-claims for debts and liquidated sums of money, the right to set them off against an assignee seems to depend on whether such claims were already in existence as accrued rights at the date of notice of the assignment. If so, they represent available equities; if not, they are not available, even if they arise out of a contract already in existence at the date of the assignment. The whole question, however, as to cross-claims on the assignment of a chose in action is one of some difficulty and obscurity, and it would not be profitable in this place to attempt any minute examination of the matter (3).

(1) [1912] 1 K. B. 181.

(2) *Young v. Kitchin* (1878), 3 Ex. D. 127; *Newfoundland (Government of) v. Newfoundland Railway* (1888), 13 App. Cas. 199.

(3) See *Re South Blackpool Hotel Co.* (1869), L. R. 8 Eq. 225; *Watson v. Mid Wales Railway Co.* (1867), L. R. 2 C. P. 593; *Roxburghe v. Cox* (1881),

Exceptions to Rule as to Assignment Subject to Equities. The general rule that a contract or other chose in action is only assignable subject to equities is limited by important exceptions.

1. In the first place, it has in general no application to the assignment of negotiable instruments. It is the essence of negotiability that the transfer of the instrument to a purchaser for value and in good faith confers in general upon that purchaser an indefeasible title free not merely from defences that were available between the immediate parties to the instrument, but even from defects of title in intermediate holders of the instrument.

2. In the second place, the rule as to equities may be excluded wholly or partially by the express or implied terms of the contract which is the subject of assignment. If, for example, a company issues debentures in such terms as are sufficient, expressly or impliedly, to preclude the company from raising against subsequent assignees defences, such as a set-off, which the company would have had against the original holder, the company will be bound by this bargain in favour of assignees. These assignees have purchased the benefit of the company's contract, and are entitled, therefore, to the benefit of all the terms of the contract so acquired, including the provision excluding the company from setting up the defences in question. Some such provision is necessary in practice in order to secure the marketable character of such debentures as, not being payable to bearer, are not negotiable instruments. Accordingly, such non-negotiable debentures commonly contain some such express condition as the following: "The principal moneys and interest hereby secured will be paid, and such moneys will be transferable as aforesaid free from and without regard to any equities between the company and the original or any intermediate holder hereof or any right of set-off or cross-claim." In the absence of such a contractual provision the rule that the assignee of a chose in action takes subject to equities applies even to a non-negotiable debenture (o). The validity of a contractual exclusion of the rule as to equities is recognised in *Re Blakely Ordnance Co.* (p) and *Re Agra and Masterman's Bank* (q). In the latter case it is said by Cairns, L.J.: "Generally speaking, a chose in action assignable

17 Ch. D. 520; *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93; *Re Taunton; Christie v. Taunton, Delmard & Co.*, [1893] 2 Ch. 175.

(o) *Re South Blackpool Hotel Co.* (1869), L. R. 8 Eq. 225; *Re Taunton*, *supra*.

(p) (1867), L. R. 3 Ch. 154.

(q) (1867), L. R. 2 Ch. 391, 397.

only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.”

3. In the third place, the debtor may be estopped by his own conduct or representations from setting up against the assignee his equities against the assignor. A mortgagor may, for example, execute a mortgage for a larger sum than has in reality been lent to him or is owing by him, having been deceived in this respect by the mortgagee. As against the mortgagee he has a good equity to resist any claim for the full amount for which this mortgage has been given. But as against an innocent assignee of the mortgage—whether by way of purchase or by way of sub-mortgage—he is estopped by his own acknowledgment in the deed from availing himself of such an equity. The purchaser or sub-mortgagee, therefore, obtains a valid title to the full nominal amount of the mortgage, notwithstanding the general rule as to the assignment of choses in action (r).

§ 170. Unassignable Contracts

Although the assignability of contractual rights is now the general rule both at law and in equity, the rule is subject to considerable exceptions.

1. In the first place, as already indicated, personal contracts are not assignable. Assignability is limited to those impersonal contracts in which the identity of the party entitled to the performance of them is treated by the law as a matter immaterial to the party from whom performance is required.

2. In the second case, contracts may be regarded by the law as unassignable from considerations of public interest. The salaries of public officials; for example, being payable to them in order that they may be in a position to perform their public functions, are not capable of anticipatory assignment (s).

3. There is some judicial authority for the proposition that a mere right of action for damages for a breach of contract is unassignable. The legal and logical validity, however, of any such distinction between the assignment of the primary rights created by

(r) *Bateman v. Hunt*, [1904] 2 K. B. 530; *Bickerton v. Walker* (1885), 31 Ch. D 161.

(s) *Stone v. Lidderdale* (1795), 2 Anst. 533; 145 E. R. 958.

a contract and the assignment of the secondary right of recovering damages for a violation of such rights is very questionable. That a right of action for damages for a tort is in general unassignable by reason of public policy is a well-established rule. But it seems difficult to extend any such doctrine to a breach of contract in cases in which the contract is itself assignable. Certainly if the contract is still subsisting, notwithstanding a partial breach thereof, there seems no reason why an assignment of the contract should not, if so intended by the parties, include an assignment of the right to damages for that breach. If there is any validity in the alleged distinction it should, it is thought, include only cases in which the contract is itself unassignable or in which the contract has been already dissolved on account of the breach and there is nothing left to be assigned save the bare right of litigation for the recovery of damages (t).

4. Can a contract be rendered unassignable, or can its assignment be restricted, by express provisions contained in the contract to that effect? On principle there seems to be no reason why this should not be so. Every assignee must be bound by the terms of the contract which is so assigned to him, and cannot claim rights as against a party to that contract which are excluded by its very terms. If A undertakes by his contract to perform certain obligations in favour of B, but by an express provision of this contract refuses to perform these obligations to an assignee of B, it is difficult to see any legal ground on which an assignee can in defiance of this provision exact those obligations from him (u). It may be, indeed, that non-assignability is in all cases to be properly regarded as the result of an express or implied term in the contract to that effect. If so, the question is in all cases one of construction, dependent on the intention of the parties, having regard to the words and the nature of the contract, so that, for example, the personal nature of the obligations involved (x) would, in a proper case, be a ground on which an implied term excluding assignment would be read into the contract. And if assignability can be thus wholly excluded by a term of the contract, it must also be possible to restrict it by prescribing the manner in which an assignment must take place. Thus it is

(t) The question is discussed and the authorities referred to by McCardie, J., in *County Hotel Co., Ltd. v. London and Northern Western Ry.*, [1918] 2 K. B. 251, 258 ff. The actual decision was affirmed on other grounds, [1921] 1 A. C. 85.

(u) Cf. *Northern Ontario Power Co., Ltd. v. La Roche Mines, Ltd.*, [1938] 3 A. E. R. 755, 761, and *Hibernian Bank, Ltd. v. Gysin & Hanson*, [1938] 2 K. B. 384.

(x) See pp. 450, 453 *et seq.*, *ante*.

usual for debentures to make express provision as to the manner and conditions of their assignment. It seems, however, that contractual restrictions on assignment will be strictly construed, and will be limited in the absence of express words to the contrary to assignments of the legal title to the contract, leaving more equitable assignments and declarations of trust unaffected. A similar restrictive interpretation is placed upon covenants against the assignment of leaseholds (y).

(y) See *Re Turcan* (1888), 40 Ch. D. 5 (life insurance policy); *Re Griffin*, [1899] 1 Ch. 408; and *Re Westerton*, [1919] 2 Ch. 104 (bankers' deposit receipt).

PART V

DISSOLUTION OF CONTRACTS

The obligation created by a contract may be dissolved in a number of ways. In the first place it may be dissolved by performance. Secondly, it may be dissolved pursuant to the declared will of one or both parties. Thirdly, it may be dissolved by reason of the operation of a condition the effect of which in the particular case may either be to terminate the contractual obligation automatically without the necessity of any further act by either party, or to vest in one party a power to rescind the contract if he so pleases. Dissolution by frustration is commonly regarded as based upon an implied condition of the first kind; dissolution for breach may be considered as founded upon a condition of the second kind, as also may dissolution of a written contract by reason of a material alteration made by one party or while the contract is in one party's custody, and without the consent of the other. Finally we may notice that a contractual obligation may be dissolved if the obligor, having become bankrupt, obtains his discharge in bankruptcy (a). This matter is more appropriately dealt with in works on bankruptcy and will not be further considered by us.

CHAPTER XIX

PERFORMANCE

§ 171. Contractual Obligation may be Discharged by Performance

A contractual obligation may be discharged by the obligor's performing that which is required of him by the terms of the contract. In answering the question in any particular case of what amounts to such performance the true meaning and interpretation of the contract must be considered. The meaning of the contract in any given case will turn on the particular words used and the circumstances (if any) qualifying and explaining them and little of

(a) S. 28, Bankruptcy Act, 1914.

a general nature can usefully be said on the matter. We may, however, notice some rules which *prima facie* apply in certain cases of common occurrence (b).

Time of Performance. Where a contract does not specify expressly the time for the performance of an obligation (and the rule applies equally to a condition (c)) the law implies a term that that performance must be rendered within a reasonable time (d).

Generally where a contract specifies a fixed date for performance, performance at any later date will in respect of the delay involve a breach of the contract. In the case of contracts (other than options) for the acquisition of interests in land (e), however, this will not be so if the performance takes place within a reasonable time of the fixed date, and the contract does not expressly declare that time is of its essence (f). An option, whether relating to land or not, if purporting to be for a fixed period, must be exercised strictly within that period and not otherwise (g).

Where there is a promise to pay money on demand no demand is necessary but the promisor becomes liable to pay as soon as all conditions precedent (excluding any demand) upon which his promise depends have been fulfilled (h). So in the case of a loan of money where no time is specified for repayment a demand is not necessary before an action can be commenced to recover the money (i). It does not appear, however, that this rule means that the debtor commits a breach of contract if he fails to pay immediately but simply that the creditor is entitled to issue his writ forthwith without making any preliminary demand (k). Indeed, it is not until an action has been commenced that the debtor is to be

(b) As to the case where the contract prescribes alternative forms of performance see p. 194, *ante*.

(c) *Jones v. Gribbons* (1853), 8 Ex. 920; 155 E. R. 1626.

(d) *Moel Tryvan Ship Co., Ltd. v. Andrew Weir & Co.*, [1910] 2 K. B. 844, 857; *Re Kawasaki, etc., and Belships Co.*, [1939] 2 A. E. R. 108.

(e) Perhaps it is more correct to say all contracts which equity will specifically enforce: Halsbury, *Laws of England* (2nd ed.), vol. 7, p. 192.

(f) *Tilley v. Thomas* (1867), L. R. 3 Ch. 61, and *Stickney v. Keeble*, [1915] A. C. 386, taken in conjunction with s. 41, Law of Property Act, 1925.

(g) *Dibbins v. Dibbins*, [1896] 2 Ch. 348.

(h) *Norton v. Ellam* (1837), 2 M. & W. 461; 150 E. R. 839.

(i) This rule, however, does not apply to the debt constituted by the deposit of money with a banker to support a current account. In such a case a demand is necessary before the banker's liability to pay arises. *Joachimson v. Swiss Bank*, [1921] 3 K. B. 110. Nor does the rule apply in the case of a guarantee of a principal debt payable on demand, a demand on the surety being a condition precedent to his liability. *Brown v. Brown*, [1893] 2 Ch. 300.

(k) In such cases the writ may be considered as itself a sufficient demand: *Bell v. Antwerp, London and Brazil Line*, [1891] 1 Q. B. 103, 107; *Joachimson v. Swiss Bank (supra)*, per Bankes, L.J., 115.

regarded as having committed a breach of contract. Payment at any time before action commenced will be a complete performance of the obligation and tender of payment within that time will be tender of such performance (l). In other cases a promise to do something on demand means what it says and performance is not due before but becomes due within a reasonable time after a demand is made (m). After the lapse of such a time the promisor if he has not already performed will have committed a breach of contract.

Place of Performance. Where the promisor can perform his promise only in the presence of the promisee and the contract contains no express term providing for the place and time at which that performance is to take place, the promisor must generally seek out the promisee (n) and tender the performance to him (o). This rule applies especially to contracts to pay money but is not limited to them (p). It does not apply to contracts for the sale of goods (q), and it may be excluded by the express (including the tacit (r)) terms of the contract.

Payment of Money. Payment is performance only if made by the debtor or his agent (s). The debtor must tender either the exact sum or a greater sum without asking for change (t), and the money tendered must conform with the provisions of the several statutes defining what is legal tender in respect of a debt (u). Pay-

(l) See p. 497, *post*.

(m) *Massey v. Sladen* (1868), L. R. 4 Ex. 13; *Moore v. Shelley* (1883), 8 App. Cas. 285, 292-3.

(n) As to the position where the promisee has since the making of the contract gone abroad, see *Fessard v. Mugnier* (1865), 18 C. B. (n.s.) 286; 144 E. R. 453.

(o) *Haldane v. Johnson* (1853), 8 Ex. 689; 155 E. R. 1529.

(p) *Cranley v. Hillary* (1813), 2 M. & S. 120; 105 E. R. 327.

(q) As to these see s. 29, Sale of Goods Act, 1893.

(r) *Riley v. William Holland & Sons, Ltd*, [1911] 1 K. B. 1029, 1031.

(s) *Smith v. Cox*, [1940] 3 A. E. R. 546. As to the case where the creditor accepts payment from a third party, see pp. 505 *et seq.*, *post*.

(t) *Robinson v. Cook* (1815), 6 Taunt 336; 128 E. R. 1064.

(u) S. 4, Coinage Act, 1870; s. 6, Bank of England Act, 1833, as amended by s. 1 (2) and (3) (a), Currency and Bank Notes Act, 1928. Of recent years the departure of England from the gold standard has given rise to difficult problems as to the construction and validity of gold clauses, i.e., promises in various forms of words that debts should be paid in gold. See e.g., *Feist v. Société Intercommunale Belge D'Electricité*, [1934] A. C. 161; *R. v. International Trustee for Protection of Bondholders Akt.*, [1937] A. C. 500. Another kind of problem has arisen where currency depreciation has occurred as between two countries whose currency is described by the same terminology and there is a promise to pay a sum of money which so far as the mere words of the contract are concerned might be in the currency of either country. See *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A. C. 122; *Auckland Corporation v. Alliance Assurance Co., Ltd.*, [1937] A. C. 587.

ment otherwise than in accordance with these rules will not be performance but may discharge the obligation by way of accord and satisfaction (x).

Appropriation of Payments. If several debts are owed by a debtor to a creditor and the debtor pays to the creditor a sum insufficient to discharge all of the debts, the question may arise of which of the debts was in fact discharged (partially or wholly) by the payment. The principal rules on this question are as follows: (1) The debtor may before or at the time of payment state to the creditor (y) in respect of which debt the payment is made, and this appropriation will bind the creditor (z). (2) If the debtor fails at or before payment thus to appropriate the payment to any particular debt, the creditor may appropriate the payment to whichever debt he pleases (z), including a debt rendered by the Limitation Act, 1939, Statute of Frauds or similar enactment irrecoverable by action (a), or an unsecured debt where another debt is secured (b). The creditor is not bound to make his election at once (c), but if he delays his right to elect may sometimes be lost by reason of supervening circumstances (d). (3) In the case of a current account with a banker or a series of dealings recorded in the form of a current account the foregoing rules are modified to the extent that unless the contrary appears it is presumed that debits and credits have been appropriated to discharge each other *in toto* or *pro tanto* in chronological order. This presumption is known as the rule in *Clayton's Case* (e). It does not exclude the right of the debtor, or failing him the creditor, to make an express appropriation (f), but merely regulates the matter in the absence of any such express appropriation. (4) An appropriation by a creditor does not irrevocably bind him until he communicates it to the debtor (g), but

(x) See pp. 496 *et seq.*, *post*

(y) *Leeson v. Leeson*, [1936] 2 K. B. 156, 163.

(z) *Deeley v. Lloyds Bank, Ltd.*, [1912] A. C. 756, 783; *Leeson v. Leeson*, *supra*.

(a) *Mills v. Fowles* (1839), 5 Bing. N. C. 455; 132 E. R. 1174. Cf. *Smith v. Betty*, [1903] 2 K. B. 317.

(b) *Deeley v. Lloyds Bank, Ltd.*, [1912] A. C. 756.

(c) *The Mecca*, [1897] A. C. 286.

(d) *Smith v. Betty*, [1903] 2 K. B. 317, 323-4; *Seymour v. Pickett*, [1905] 1 K. B. 715, 727.

(e) (1816), 1 Mer. 529, 572; 35 E. R. 767, 781.

(f) *Deeley v. Lloyds Bank, Ltd.*, *supra*.

(g) *Simson v. Ingham* (1823), 2 B. & C. 65; 107 E. R. 307.

upon his making such a communication his election is finally determined (h). This rule applies whether the creditor makes his appropriation by entering the item in a current account (i), or in any other manner.

(h) *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K. B. 307, 313.

(i) *Simson v. Ingham*, *supra*.

CHAPTER XX

DISSOLUTION PURSUANT TO THE DECLARED WILL OF ONE OR ALL OF THE PARTIES

§ 172. Release, Rescission, Accord and Satisfaction

Just as contractual rights are created by the declared will of the obligor, or of the obligor and the obligee, so they may be dissolved by the same means. The declaration of will which thus dissolves a contract or contractual rights, however, is not in itself a contract but is an act in the law of an essentially different legal nature. It does not create but extinguishes rights and obligations. It is true, indeed, that a dissolution of a contract is often associated with the simultaneous creation of a contract; for the parties, while dissolving their already existing contract, may at the same time enter into a new contract in substitution for, or consequentially on the dissolution of, the old contract. This, however, is not necessarily the case. A declaration of will may relate to dissolution *simpliciter* and may not include any additional or accessory contractual element; and the declaration, even when it does include such an element, is nevertheless so far as it dissolves a previously existing contract or contractual rights, not contractual in its nature, but as distinct from a contract as is a grant or assignment.

Nevertheless the declared will operating to dissolve a contract or contractual rights is subject to many of the same principles as the declared will constituting a contract. It may be the declared will of one party, the obligee, alone. In this case it must generally (a) be by deed. If the dissolution does not take the form of a deed, however, then in general (a) it must amount to an agreement supported by consideration. Ordinarily the gratuitous surrender of contractual rights (b) and the gratuitous acceptance of legal obligations are equally inoperative in law unless they are effectuated by deed (a). The same principle applies to the release of non-contractual obligations. The release of a non-

(a) The rules as to the cancellation of instruments, the renunciation of bills of exchange, cheques and promissory notes and the disclaimer of deeds stated at pp. 502 *et seq.*, *post*, constitute exceptions to these general statements.

(b) *Edwards v. Walters*, [1896] 2 Ch. 157.

contractual debt, or the abandonment of a claim for damages for a tort, by mere gratuitous consent without deed or valuable consideration is no more operative than a similar surrender of the rights conferred by a contract.

As a result of this general principle the dissolution of a contract by operation of the declared will of the party or parties in general takes place in three distinct methods, namely:—

- (1) Release by deed.
- (2) Rescission in a narrow and specific sense; and
- (3) Accord and satisfaction.

Release. By a deed of release any contract may be dissolved, any contractual rights surrendered, and any contractual obligations extinguished; and it is immaterial whether such a release is based on valuable consideration or not (c).

Rescission. By rescission, in this connection, is meant an agreement whereby a bilateral contract which still remains in whole or in part executory on both sides is dissolved by mere mutual consent. Each party surrenders his contractual rights and releases the other party from his corresponding contractual obligations. For such an operation no deed is necessary, nor need any consideration move from one party to the other beyond the consideration necessarily involved in such a reciprocal surrender of rights. Since the contract still remains executory on both sides, each party is bound by an unfulfilled and subsisting obligation towards the other. Each of them, therefore, is in a position to purchase his discharge from that liability by granting a similar discharge to the other. Neither deed of release nor any valuable consideration *ab extra* is necessary, and the mere mutual assent of both parties that the contract shall be determined amounts to a fully operative dissolution thereof. It is unfortunate that in order to indicate such a consensual dissolution of a bilateral executory contract there is no recognised specific term, and that it is necessary to use in a specific sense the generic and ambiguous term rescission. In its generic sense rescission includes the dissolution of a contract even by the act of one of the parties alone, as when we speak of rescission because of breach or because of fraud; but in this specific sense rescission means the dissolution of a bilateral executory contract by the mutual assent of the parties

(c) *Foster v. Dawber* (1851), 6 Ex. 839, 851; 155 E. R. 785, 790; *Edwardes v. Weekes* (1677), 1 Freem. K. B. 230; 89 E. R. 164.

by way of the reciprocal surrender of their contractual rights against each other.

Accord and Satisfaction. The third method in which a contract is dissolved by operation of the declared will is that which is known in the technical language of the law as accord and satisfaction. This takes place where there is no such mutual release of reciprocal obligations, but merely a unilateral release of one party from some or all of his obligations or liabilities in consideration of some payment or other valuable consideration moving from him to the other party. By accord is meant the agreement to dissolve, and by satisfaction is meant the consideration so moving from the party released to the other. Thus when a claim for damages for breach of contract is settled by the payment of a sum of money the transaction is one of accord and satisfaction. So also when a debt is discharged by mutual agreement, through the delivery of goods or the rendering of services instead of payment of the debt itself.

Dissolution by way of accord and satisfaction commonly takes place in cases in which dissolution by way of rescission is impossible, inasmuch as there are no reciprocal rights and obligations which can be the subject of mutual surrender. This state of things may occur in several ways. Thus the contract may be in its origin unilateral, imposing obligations on one party only: as in the case of a loan of money, or a gratuitous covenant or bond. Or the contract, although in its origin bilateral, may have been completely executed on one side, so that the only remaining executory obligation is on the other side: as when goods sold have been delivered and the price remains unpaid. Or the contract may have been already so far dissolved by breach that there is no contractual right or obligation left subsisting except that of paying and receiving damages for the breach of it. In all these cases rescission, in the sense already explained, is impossible, for there can be no mutual discharge of each party by the other. Dissolution, therefore, must take place either by way of release by deed or by way of accord and satisfaction.

Even, however, in the case of a contract executory on both sides there may be a transaction by way of accord and satisfaction instead of by way of rescission: as when a claim for damages for a partial breach of contract is settled by payment of an agreed sum, the contract in other respects remaining on foot. So also both of these methods of dissolution may be combined in the same transaction; so far as the contract still remains executory on both sides it may be the subject of rescission, while at the same time the liability of

one of the parties for a breach already committed by him is discharged by accord and satisfaction; as where an agreement for the hire of a chattel for a fixed period is rescinded by mutual consent on the terms that the hirer shall pay a certain sum as compensation for damage done to the chattel while in his possession.

When a contract is dissolved by release by deed no consideration is necessary at all. When it is dissolved by rescission the necessary consideration is found within the contract itself—namely, the reciprocal surrender of the mutual rights created by it. When, in the third place, the contract is dissolved by accord and satisfaction the requisite consideration is supplied *ab extra* by the party released—*e.g.*, by the payment of money—and is not to be found in the mere act of dissolution itself.

Such is the general nature of the distinction between the three methods of the discharge of contractual rights and obligations by the declared will of the party or parties—namely, release, rescission and accord and satisfaction. As to the first of these nothing more requires to be said in this place, but it is necessary to deal more particularly with the incidents of the other two. We shall deal in the first place with rescission and thereafter with accord and satisfaction.

§ 173. Rescission

As already indicated, rescission, as opposed to release and to accord and satisfaction, means the consensual dissolution of a contract at a time when it still remains executory on both sides: as where a contract for the sale and purchase of goods is dissolved by mutual consent before the goods have been delivered or the price paid. It is sometimes said that the rescission of a contract can only take place before the breach of it, and that after breach dissolution must be effected by way of release or accord and satisfaction. This, however, is not the true distinction. The real test is whether there still remains some unfulfilled obligation or liability on each side. Even without a breach of the contract this condition may not be satisfied, for the contract may be *ab initio* a unilateral one, or it may have become unilateral by the complete performance of the obligation of one party, while that of the other remains outstanding; as when the seller has delivered the goods, but the buyer has not yet paid the price. In such cases, although the contract has not been broken, it must be dissolved by way of release or accord and satis-

faction and not by way of mere rescission (*d*). Conversely, even if there has been a breach of a bilateral contract rescission by agreement is not thereby rendered impossible unless the breach is essential and the injured party has elected to determine the contract by his unilateral act or the breach is of such a nature as itself to dissolve the contract (*e*), so that the only liability outstanding is that of the defaulting party to pay damages. A breach of contract, so long as the contract is not determined therefor or thereby and reciprocal obligations continue to exist on each side, has no effect in precluding dissolution by way of agreed rescission. A contract for the sale of land can still be rescinded by mutual consent notwithstanding that either the vendor or the purchaser has made default in completing it in due time.

§ 174. Restitutio in Integrum

Rescission may take place either while the contract remains wholly executory or after partial performance has taken place on one or both sides. In the latter case a question may arise as to the mutual rights of the parties after dissolution in respect of those acts of part performance. How far, if at all, are the parties to a contract so dissolved entitled to *restitutio in integrum* in respect of property delivered, money paid, or services rendered by way of part-execution of the contract prior to the dissolution of it? The rights of the parties in this respect are left by the law to be determined by the agreement of dissolution itself. They may make whatever bargain they please as to the terms upon which their contract is to be dissolved. If, however, they make no such bargain, but content themselves with dissolution *simpliciter*, such dissolution will operate merely *in futurum* by way of the extinction of all obligations which are still unperformed, and will not confer upon either party any right of restitution or compensation in respect of prior acts of performance (*f*).

§ 175. Rescission Not Variation

Rescission is either total or partial. Total rescission destroys the entire contractual relation, the whole of the subsisting rights and obligations under the contract being surrendered or discharged. It

(*d*) *Foster v. Dawber* (1851), 6 Exch. 839, 851; 155 E. R. 785, 790; *Edwards v. Chapman* (1836), 1 M. & W. 231; 150 E. R. 419.

(*e*) See p. 559, *post*.

(*f*) *Lamburn v. Cruden* (1841), 2 Man. & G. 253; 133 E. R. 741; Leake, *Contracts* (7th ed.), 41.

may or may not be rescission *simpliciter*, for it may or may not be accompanied by the formation of a new and substituted contract between the same parties; but in either event the original contract is wholly abolished and determined. Partial rescission, on the other hand, does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein, with or without the substitution of new rights and obligations in their place. Partial rescission is not the extinction of the contract but the variation of it. The term rescission, indeed, is often used in a narrower sense to mean total rescission, and is opposed in this sense to mere variation (g).

A contract may be varied (1) by way of partial rescission without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial rescission at all. Thus a building contract may be varied in the first manner by merely cutting out part of the work to be done; it may be varied in the second manner by cutting out part of the work and substituting other work; and it may be varied in the third manner by adding extras to the work originally contracted for. In other words, a contract may be varied either by way of addition, or by way of subtraction, or by way of substitution. The chief importance of the distinction between total rescission and mere variation exists in relation to the parol rescission or variation of contracts required to be in writing, and in this connection it will be again referred to (h).

§ 176. Parol Rescission and Variation of Written Contracts

There is no general rule of law that the rescission or variation of a contract must be effected in the same manner and form in which the contract itself was made. A written contract may be rescinded or varied by word of mouth. It makes no difference in this respect whether the rescission is total or partial, or whether it amounts to rescission *simpliciter* or to rescission coupled with a new and substituted verbal contract. The general principle which was dealt with in a former chapter to the effect that verbal evidence is not admitted to contradict, add to, or vary a written contract has no

(g) Cf. *per* Lord Hanworth, M.R., in *Royal Exchange Assurance v. Hope*, [1928] Ch. 179, 191.

(h) See *infra*.

application to evidence of the subsequent rescission or variation of a written contract by a parol agreement. A written instrument is conclusive evidence that when the contract was first made its terms were those set out in that instrument and no other terms, but it is not conclusive evidence that the contract has not since its making been wholly or partially rescinded or varied by a subsequent agreement whether in writing or by parol (*i*).

At common law there was an exception to this rule in the case of contracts by deed. Such a contract could not be rescinded or varied by a mere agreement which was not itself by deed (*k*). The conclusive authority of a deed was such as not to admit of any such abrogation or derogation by the mere informal consent of the parties. Equity, however, did not recognise any such principle. The Court of Chancery did not permit the enforcement of a contract by deed in breach of an agreement of the parties to rescind or vary it. Since the Judicature Acts the equitable rule prevails over that of common law in Courts having a concurrent jurisdiction in equity and common law (*l*), and the informal rescission or variation of a specialty contract is a good plea in those Courts in any action for the enforcement of it according to its terms (*m*).

§ 177. Rescission or Variation of Contracts under Statute of Frauds

Rescission by Word of Mouth. What shall be said, however, where the original contract is not merely in writing but is one which requires to be in writing under section 4 of the Statute of Frauds, section 4 of the Sale of Goods Act, or section 40 of the Law of Property Act, 1925? Can such a contract be rescinded or varied by word of mouth without writing, or does the same requirement of writing which applies to the making of it extend to the rescission or variation of it also? This is a question of considerable practical importance in view of the frequency with which contracts originally reduced to writing in obedience to the statutory requirements are subsequently made the subject of modifying oral agreements or understandings between the parties. It appears from the decision of the House of Lords in *Morris v. Baron* (*n*) that an essential distinction exists in this respect between the total rescission of a contract

(*i*) *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, 65; 110 E. R. 713, 716.

(*k*) *West v. Blakeway* (1841), 2 Man. & G. 730; 133 E. R. 940.

(*l*) *Foster v. Reeves*, [1892] 2 Q. B. 255.

(*m*) *Steeds v. Steeds* (1889), 22 Q. B. D. 537; *Berry v. Berry*, [1929] 2 K. B. 316.

(*n*) [1918] A. C. 1.

and its mere variation by way of partial rescission or otherwise. A contract in writing under the statutes may be wholly rescinded by the parol agreement of the parties, and this is so whether such rescission takes place *simpliciter* or whether it is accompanied by the making of a new and substituted contract between the parties. An oral rescission is valid and operative, for the statutes in question merely require writing for the making of contracts, not for the dissolution of them. It is true that if such a total oral rescission is accompanied by the making of a new and substituted oral contract between the parties, this new contract may itself be unenforceable because it does not conform to the statutory requirements; but this circumstance is not in itself sufficient to invalidate the accompanying oral rescission of the old contract. Such a rescission was intended by the parties, and there is nothing in the statutes in question to prevent this intention from having full effect. The unenforceability of the new and substituted contract is doubtless a circumstance to be taken into account in determining whether the parties did in truth intend a complete and unconditional rescission of the old. But if it is clear from their words or from the nature of the transaction that that was in truth their intention it will have full effect. The old contract will be extinguished by rescission, and the new contract will be unenforceable because not in writing as required by the relevant statute.

Variations Not in Writing. Such is the law established with respect to total rescission by *Morris v. Baron* (o). With respect to a parol variation as opposed to a total rescission of a contract in writing under the statutes, however, the position is more complicated. There is nothing in the statutes which demands that a variation as such should be in writing. It would seem, therefore, that a distinction must be drawn between variations which when added to what remains of the original contract result in a composite contract not within the statutes, and those which result in a contract which continues to be within one or more of the statutes (p). In the former case it is submitted both on principle and authority that the statutes have no application and the variation will be good without writing (q).

(o) [1918] A. C. 1.

(p) Cf. *per* Denman, C.J., in *Goss v. Nugent*, quoted *infra*, p. 492

(q) *Williams v. Moss Empires, Ltd.*, [1915] 3 K. B. 242, especially *per* Shearman, J., at 247. Shearman, J.'s, statement was approved by Lord Palmer in *Morris v. Baron*, [1918] A. C. 1, 39. Cf. Lord Haldane, *ibid.*, at pp. 19, 20. See also *Williams*, Statute of Frauds, 182-3.

With regard to cases in which the oral variation has resulted in a contract which is still within the statutory provisions, however, different considerations are involved. In respect of such cases two questions arise. The first is whether the contract can be enforced in its varied form. The second is whether the contract can be enforced in its original form, disregarding the parol variation. The first of these questions is answered in the negative by the Court of King's Bench in *Goss v. Nugent* (r); and the second in the affirmative by the Exchequer Chamber in *Noble v. Ward* (s). In *Goss v. Nugent* the plaintiff, as vendor, sued for the enforcement of a written contract for the sale and purchase of land. The defendant pleaded that the plaintiff had no title to part of the land sold. The plaintiff replied that by a subsequent oral agreement the defendant had waived this defect and had agreed to complete the contract notwithstanding it. It was held that the plaintiff could not rely on any such oral variation of a written contract for the sale of land, and that his defective title was a bar to his action on the written contract in its original form. "We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But in the present case the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement and partly by the new verbal agreement" (t).

The second and converse question arose in the Exchequer Chamber in *Noble v. Ward* (u). In that case the contract was for the sale of goods over the value of £10, and was in writing as required by the statute. Before the due date of delivery the parties orally agreed to extend the time for delivery. The goods were tendered by the seller within the extended time so orally agreed upon, but the buyer refused to receive them. It was contended on behalf of the defendant buyer that he was not bound by the new contract because it was not in writing; and that he was not bound by the old one either, inasmuch as it had been rescinded by the new oral agreement which had been substituted for it—an agreement, which, though invalid as a contract for want of writing, was valid as an agreement for dissolution. It was held, however, that the original

(r) (1833), 5 B. & Ad. 58; 110 E. R. 713.

(s) (1867), L. R. 2 Ex. 135.

(t) 5 B. & Ad. at p. 65; 110 E. R. 716 (*Cur.*, per Denman, C.J.).

(u) (1867), L. R. 2 Ex. 135.

contract remained in full force and effect unaffected by the parol variation. Since the parol agreement was not fully operative as a contract it was held inoperative as a rescission. It is said by Willes, J., delivering the judgment of the Exchequer Chamber: "It is quite in accordance with the cases . . . to hold that where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights" (x).

The joint effect of the decisions in *Goss v. Nugent* and *Noble v. Ward* is that where a contract evidenced by writing pursuant to the statutory requirements is subsequently varied in such a way that the resulting composite contract is still within these requirements, the variation will be inoperative either to enable the contract to be enforced in its altered form or to prevent it from being enforced in its original form. The variation operates neither by way of contract nor by way of rescission.

But *Morris v. Baron* (y) in the House of Lords shows that the rule so established by *Noble v. Ward* has no application to total and unconditional rescission as opposed to the mere variation of the contract, even though such total rescission is not effected *simpliciter*, but is accompanied by the creation of a new contract between the parties. Where the intention of the parties is to put an end entirely and unconditionally to the old contract this intention will be fully effective, even though at the same time a new contract is made which fails of effect because not in writing. But in the case of a mere variation there is no such independent and unconditional intention to rescind the old contract either wholly or in part. The intention of rescission amounts to nothing more than an intention to rescind the old contract so far as it is effectually superseded by new provisions inconsistent therewith. So far as the intended alteration fails to become fully operative, whether because of the Statute of Frauds or otherwise, the original contract remains unaffected. In other words, the question whether a valid written contract is rescinded by making a new parol contract inconsistent therewith, and itself incapable of enforcement because not in writing, is a question which depends on the intention of the parties in the matter of such rescission. If the intention was unconditionally to rescind the old contract, the rescission is effective even though the new contract is

(x) At p. 138.

(y) [1918] A. C. 1.

invalid; but if, on the contrary, the intention to rescind is conditional on the effective substitution of a new and fully effective contract, the old contract will remain in full force so long as the new one remains unenforceable for want of writing. *Prima facie* the total rescission of a contract is intended as absolute and unconditional; *prima facie* its partial rescission by way of variation is intended to be conditional on the effective operation of the substituted provisions. But doubtless in either case a different conclusion as to the real intention of the parties may be necessitated by the language used or the circumstances of the case (z).

Cases in which Variation by Word of Mouth Effectual. Although the parol variation of a written contract under the statutes should thus be ineffective either to enable that contract to be enforced as so varied or to prevent the original contract from being enforced in its unaltered form, it is not necessarily destitute of all effect whatever. It may operate in at least two other methods.

In the first place, although such a parol variation is not binding as an executory contract, nevertheless if the variation is of such a nature as to amount to a substituted mode of performance, and if performance in this altered manner subsequently takes place with the consent of the parties, it is too late for either party to complain that such performance was not in accordance with the true and written contract. No person can by a parol variation bind himself to accept a mode of performance different from that provided by the written agreement, but when he stands by and accepts performance in a different manner he is bound by his assent notwithstanding the contract. This rule was established by *Leather-Cloth Co. v. Hieronimus* (a), in which case goods ordered to be sent to the buyer by one route were with his parol consent sent by another route, but were lost by marine perils on the way. It is there said by Blackburn, J. (b): "I cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing and may not be by parol, though the original contract must have

(z) "What was therefore decided [in *Noble v. Ward*] was merely that where parties enter into an invalid contract which purports to vary, and only to that extent to supersede or rescind, an earlier written contract, the later one does not operate validly. It was not decided by *Noble v. Ward* that the Statute of Frauds prevents a parol agreement, if it plainly purports to do so, from rescinding in its entirety a previous written contract. Even although itself incapable of being sued on a parol contract may have that effect. The question is whether there is an intention in any event to rescind, independent of any further intention which may exist to substitute a second contract." Lord Haldane, *ibid.*, at p. 18.

(a) (1875), L. R. 10 Q. B. 140.

(b) *Ibid.*, at p. 146.

been in writing. They are quite different things, the proof of a substituted contract and the proof of a ratification or approval, after performance, of the substituted mode of performance”.

In the second place, the rule as to the invalidity of parol variations does not affect the law as to the waiver of conditions. Any party to a contract may waive contractual conditions in his own favour, and it makes no difference in this respect that the contract is in writing under the statutes and the waiver by word of mouth or by conduct without writing (c). The effect of waiver is not to vary the written contract, but merely to prevent the party from relying on the non-fulfilment of the condition so waived. Thus it frequently happens that after a written contract for the sale of goods is entered into a subsequent verbal arrangement is made at the request of one or other of the parties, prior to the due date of delivery, for the postponement of delivery. If the seller in pursuance of such arrangement allows the time for delivery as fixed for the written contract to pass by without tendering the goods, and the buyer subsequently refuses a tender made within the extended time for delivery, what is the legal position of the seller? The only contract which he can sue on is the original written contract in its unaltered form; but he has himself broken the terms of that contract in an essential point, for he did not tender the goods in due time. Can the buyer, then, take advantage of this breach of condition so as to repudiate the goods and defeat the vendor's claim? The answer is No. For the buyer has by his parol agreement effectually precluded himself from relying upon the seller's delay as a breach of condition. This parol agreement for postponement, though inoperative as a contractual variation of the written contract, is good enough as a waiver of the condition of delivery on the due date (d). It is thought that it can make no difference in this respect whether the delay is due to the request of the seller, or to that of the buyer (e). It must appear, however, that the arrangement as to delay amounts merely to a voluntary forbearance of one party on the request of the other, and is not intended to bind the parties contractually (f).

Different considerations, however, apply when the negotiations

(c) *Morrell v. Studd & Millington*, [1913] 2 Ch. 648, 660; *North v. Loomes*, [1919] 1 Ch. 378, 386. See also n. (n), p. 358, *ante*.

(d) *Ogle v. Vane* (1868), L. R. 3 Q. B. 272.

(e) *Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Besseler, Waechter, Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408. But see *Plevins v. Downing* (1876), 1 C. P. D. 220.

(f) *Besseler, Waechter, Glover & Co. v. South Derwent Coal Co.*, *supra*.

for postponed delivery do not take place until after the seller has already made such default in delivery under the written contract as to render it determinable by the buyer. In such a case the question is whether the subsequent negotiations are of such a nature as to amount to a confirmation of the contract and to estop the buyer from taking advantage of a prior breach of condition (g).

Hitherto we have spoken in this section of the case of the variation of a contract originally subject to the statutory requirements. It may happen, however, that a contract originally outside the statutes is made the subject of a variation introducing matter to which one or other of the statutes would apply. In such a case it would seem that the entire contract, both the remaining old terms and the new terms introduced by the variation, must comply with the statutory requirements (h).

§ 178. Accord and Satisfaction

We pass now from dissolution by way of rescission to dissolution by way of accord and satisfaction. By this is meant the purchase of a release from an obligation by means of any valuable consideration, not being the actual performance of the obligation itself, and not being that mutual discharge of reciprocal obligations which is called rescission. The accord is the agreement by which the obligation is so dissolved and discharged; the satisfaction is the consideration which makes this agreement operative.

The doctrine of accord and satisfaction is not limited to contractual obligations, but extends to all obligations irrespective of their source. Liability to pay damages for a tort and liability for a non-contractual debt may be destroyed by accord and satisfaction no less than a contractual obligation. For the sake of convenience we shall hereafter speak of the parties to an accord and satisfaction as the creditor and the debtor, taking the case of a debt as a typical example.

An obligation is, as we have seen (i), destroyed and dissolved by the performance of it. Once the obligation has been broken, however, whether by the passing of the time for its performance or otherwise, the liability of the obligor may thenceforth be discharged by accord and satisfaction, but except in one case, no longer by the performance of the original obligation. The excepted case is that

(g) *Hartley v. Hyman*, [1920] 3 K. B. 475.

(h) *Williams v. Moss Empires, Ltd.*, [1915] 3 K. B. 242, 247, *per* Shearman, J. See n. (g), p. 491, *ante*.

(i) See p. 479, *ante*.

of a debt in terms due on a fixed date but for delay in payment of which substantial damages cannot be recovered. The obligation involved in a debt due on a fixed date can in terms be performed only by payment on that date. Failure to pay on the due date should on principle constitute a breach of contract and the creditor should be entitled to recover not merely the amount of the debt but in addition either nominal or substantial damages for the delay (*k*). If the debtor is to be discharged by payment after due date, therefore, that payment should in theory be accepted by the creditor by way of accord and satisfaction in respect of both debt and damages. "Where money is paid, not in performance of a promise, at the precise day on which it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment but acceptance in satisfaction" (*l*). Moreover, the transaction should be supported by a sufficient consideration (*m*). At the present day, however, these principles apply in their entirety only to debts for the detention of which after due date the creditor is entitled to recover substantial damages (*n*). In respect of debts for the detention of which only nominal damages may be recovered (*o*), it is now settled that if the creditor before commencing an action accepts payment of the amount of the debt he is conclusively presumed to do so in full satisfaction of both the debt and the debtor's liability to pay nominal damages (*p*). Moreover, in such a case a tender after due date but before action commenced is equivalent to a tender on due date (*q*). In other words, throughout the period immediately after the due date until action commenced the debtor can discharge the debt in exactly the same way as on the due date. That is to say, throughout this period payment of the debt is in effect a discharge of it by way of performance and not accord and satisfaction.

Executed and Executory Satisfaction. In a former chapter relative to the consideration which is requisite for the validity of a

(*k*) See p. 578, *post*. See also pp. 592-3, *post*.

(*l*) Williams, J., in *Chambers v. Miller* (1862), 13 C. B. (N.S.) 125; 143 E. R. 50, 53. See also *Poolo v. Tumbridge* (1837), 2 M. & W. 223, 226; 150 E. R. 738, 739; *Société des Hôtels le Touquet Paris Plage v. Cummings*, [1922] 1 K. B. 451.

(*m*) See p. 501, *post*.

(*n*) *Hume v. Peplow* (1807), 8 East 168; 103 E. R. 306; *Poolo v. Tumbridge*, *supra*; *Dobie v. Larkan* (1855), 10 Ex. 776; 156 E. R. 654.

(*o*) See p. 592, *post*.

(*p*) *Beaumont v. Greathead* (1846), 2 C. B. 494; 135 E. R. 1039; *Société des Hôtels, etc. v. Cummings*, *supra*.

(*q*) *Briggs v. Calverly* (1800), 8 T. R. 629; 101 E. R. 1585; *Moffat v. Parsons* (1814), 5 Taunt. 307; 128 E. R. 707; Maule, J., in *Beaumont v. Greathead* (1846), 2 C. B. 494, 499; 135 E. R. 1039, 1041.

simple contract we saw that such consideration is of two kinds, being either executed or executory. An executed consideration is an act done in exchange for a promise, while an executory consideration is a promise made in exchange for another promise. The same distinction exists in respect of the consideration necessary to constitute a valid accord and satisfaction. The satisfaction may be either executed or executory: the creditor may release his debtor, either in exchange for something actually and presently done or given by the debtor, or in exchange for the contract of the debtor to do or give something in the future. The formula of an accord with executed satisfaction is, "I release you from your obligation in consideration of the sum of £100 now paid by you to me". The formula of an accord with executory satisfaction is, "I release you from your obligation in consideration of your promise to pay me the sum of £100 in six months" (r).

Formerly, indeed, the law was otherwise. The law of discharge by accord and satisfaction was earlier in its origin than the establishment of the modern doctrine of executory contracts in which mutual promises form a sufficient consideration for each other. It was formerly considered necessary, therefore, that an accord and satisfaction should be executed. So long as it remained merely executory it did not effect any dissolution of the original obligation, nor did the accord in itself amount to any binding contract to accept the satisfaction offered (s). Although modern law has long departed from this earlier view and now freely recognises the binding operation of an executory accord and satisfaction in which the consideration for the release is nothing more than a new contract entered into by the debtor, yet the law as to accord and satisfaction is usually stated to this day in a manner which does lip-service to the older doctrine while recognising the new in effect and substance.

In *Morris v. Baron* (t) it is said by Lord Atkinson: "There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's Case* (u). If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise, and not the per-

(r) *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616. Scrutton, L.J., at p. 648, expressly approves Sir John Salmond's treatment of the question of the validity of an executory accord and satisfaction.

(s) Holdsworth, *History of English Law*, viii, 81-5.

(t) [1918] A. C. 1, 35.

(u). (1611), 9 Rep. 77b, 79b; 77 E. R. 847, 851.

formance of that promise, the original cause of action is discharged from the date when the promise is made ”.

In modern law it is a mere question of construction and of the intention of the parties whether an accord is already binding as soon as made, although the satisfaction agreed upon is still executory and rests merely on a new contract not yet performed; or whether the accord does not become binding until this satisfaction has been actually received by the creditor. An undertaking to accept £100 in satisfaction and discharge of a claim for damages for breach of contract may mean one of two different things. It may mean: “If you pay me £100 I shall abandon my claim, but until you actually pay it, and until I actually receive it, my claim remains unaffected”. This is a mere offer or proposal of an accord with executed satisfaction. Neither party is bound until the offer has been accepted by the actual giving and receiving of satisfaction. On the other hand, the transaction may mean: “In consideration of your present promise to pay me £100 I here and now release you from my claim for damages”. This is an immediately operative release of the obligation coupled with an immediately binding contract to pay the agreed satisfaction, the consideration for that contract being the release so given. *Prima facie* no doubt an agreement by way of accord and satisfaction is to be read as contemplating an executed and not a merely executory satisfaction. *Prima facie* the offer of the creditor is to accept in satisfaction actual payment and not the mere promise of payment. If the intention to accept a merely executory satisfaction can be shown, however, it will be fully effective (x).

Position Where New Promise Broken or Unfulfilled. In the case of executory accord and satisfaction—where the thing accepted in satisfaction is merely a new promise or contract by the debtor—what is the legal position if that new promise or contract is subsequently broken and remains unfulfilled? Is the creditor limited to a right of action for the enforcement of it, or is he at liberty to disregard the accord and satisfaction as abortive and have recourse to his former right of action for the enforcement of the original obligation? This also is a question of construction and the true intention of the parties. Where a new contract or promise is thus accepted by way of accord and satisfaction, the creditor may accept it either as an absolute discharge of the prior obligation or merely

(x) Cf. *per Greer, L.J.*, in *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616, 654-5.

as a conditional discharge of it—conditional, that is to say, on the due performance of the contract so made and so accepted by way of satisfaction. If the discharge is absolute the subsequent breach of the substituted contract will not revive the former obligation, and the creditor will be limited to a right of action for the enforcement of the new contract. But if the discharge is conditional only, the non-performance of the new and substituted contract will revive the former obligation, and the creditor will have a double and alternative remedy. He may have recourse either to his right of action on the original contract, or to his right of action on the new contract which was substituted therefor as a conditional satisfaction. Thus when the creditor has received his debtor's cheque or promissory note for £100 in satisfaction of a claim for £200 by way of damages for breach of contract, and the cheque or promissory note is subsequently dishonoured, the question whether the creditor is thereby remitted to his original right of action for damages, or is, on the contrary, restricted to his right of recovering the sum of £100 on the dishonoured instrument, is a question dependent on the true intention of the parties. *Prima facie* in such a case the cheque or promissory note is accepted in absolute and not merely conditional satisfaction and discharge of the claim for unliquidated damages, and the creditor cannot subsequently have recourse to his former right of action. If, on the contrary, the creditor received his debtor's cheque or promissory note for the amount of a liquidated debt, such as the price of goods sold and delivered, this acceptance of one contract in satisfaction of another would *prima facie* be construed as a merely conditional payment of the original debt, and on the dishonour of the cheque or note the original debt would revive, and the creditor would have the option of suing for that debt or of suing for the equivalent amount of the cheque or note (y).

It is to be observed that the acceptance of an executory satisfaction as a merely conditional discharge of the obligation is a transaction essentially different from an offer to accept an executed satisfaction. Such an offer is not binding until the satisfaction has been actually executed. Until the money has been paid, or the goods supplied, or the services rendered, the creditor is no more bound than by any other unaccepted offer. But the acceptance of an executory satisfaction, even though only by way of conditional discharge, presently binds the creditor. If the condition is per-

(y) *Goldshede v. Cottrell* (1836), 2 M. & W. 20; 150 E. R. 651; *Re A Debtor*, [1908] 1 K. B. 344.

formed by the debtor, the original obligation is finally extinguished, and the creditor is bound to await the performance of the condition, and cannot, save on the failure of it, have recourse to his original cause of action.

Forms of Accord and Satisfaction. It follows, therefore, that an accord and satisfaction may assume any one of three different forms:—

1. The acceptance of an act—*e.g.*, the payment of money, the delivery of goods, or the rendering of services—in satisfaction and discharge of the obligation.

2. The acceptance of a new contract—*e.g.*, the giving of a promissory note or a cheque—in satisfaction and absolute discharge of the obligation, with the result that even if that contract is not performed the original obligation is none the less extinguished, and the creditor's sole recourse is on the contract so substituted for it.

3. The acceptance of a new contract—*e.g.*, the giving of a promissory note or a cheque—in satisfaction and conditional discharge of the obligation, with the result that if that contract is not performed the creditor is remitted to his original right of action, and this remedy is alternative with his right of action on the new and substituted contract.

Adequacy of Consideration. Although the law requires the existence of valuable consideration for the discharge of contractual obligations no less than for the creation of them, the adequacy of such consideration will not be inquired into in either case. Any consideration which the parties think sufficient is enough to satisfy the requirements of the law. Although a man cannot effectually promise to pay £100 for nothing at all, he can, if he pleases, bind himself to pay that sum in exchange for something which is not worth five shillings. On the same principle, although he cannot release a debt of £100 without receiving anything at all by way of satisfaction, he can effectually release it in consideration of the receipt of a box of cigars or a new umbrella from his debtor. The law insists that such transactions shall amount to bargains, and not to mere gratuitous gifts, but it is content to leave the terms of the bargain to the will and pleasure of the parties (z).

Nevertheless there is one form of consideration which the law regards as insufficient to support the discharge of an obligation,

(z) Cf. pp. 115 *et seq.*, *ante*.

because unreal and illusory. The partial performance of an obligation is not a sufficient consideration to support a release of the residue (z). In every accord and satisfaction the consideration must consist in the doing or promising of something different in its nature from the performance of the very obligation itself. In order to purchase his release the debtor must do or promise something to which he is not already bound. If it is different in kind it is good enough, even if in truth it is less in value. But no man can obtain release from the whole of what he is bound to do by performing part of it. In particular, payment of part of a debt cannot be the consideration for the release of the residue. A bargain between a creditor and a debtor that if the debtor pays one-half of the debt the creditor will forgive him the other half is in no way binding. Even if the creditor receives the half which he bargained for he retains unaffected his right to sue for and receive the other half. For the debtor gave no real consideration for his release: he merely did a part of what he was already bound to do. This rule is known as the rule in *Pinnel's Case* (a), or with less accuracy the rule in *Cumber v. Wane* (b). After having been the subject of some doubt and of considerable adverse comment, it was finally established as authentic by the decision of the House of Lords in *Foakes v. Beer* (c).

§ 179. Qualifications of Foregoing Rules and Special Cases; Cancellation; Renunciation; Disclaimer; Contracts not to Sue; Merger

Cancellation. An obligation arising from a written contract may be discharged by cancellation of the instrument by the promisee, or with his consent (d). To cancel a contractual instrument means to deface it with the intention (e) of releasing the obligations therein contained to the cancelling party. Blackstone explains (f) that an instrument is cancelled by drawing "lines . . . over it in the form of lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it". So a deed may be

(a) (1602), 5 Rep. 117a; 77 E. R. 237.

(b) (1718), 1 Stra. 426; 93 E. R. 613; 1 Smith's Leading Cases (13th ed.), 373.

(c) (1884), 9 App. Cas. 605.

(d) Sheppard's Touchstone, (Preston's ed., 1820), 69-70; 2 Bl. Comm. 308-9; *Harrison v. Owen* (1738), 1 Atk. 520; 26 E. R. 328; *Alsager v. Close* (1842), 10 M. & W. 576; 152 E. R. 600; *Sweeting v. Halse* (1829), 9 B. & C. 365; 109 E. R. 136; *Yglesias v. River Plate Bank* (1877), 3 C. P. D. 60. These authorities relate to deeds and bills, but there is no doubt that the rule applies to contractual instruments generally. Halsbury, Laws of England (2nd ed.), vol. 10, p. 251.

(e) *Perrott v. Perrott* (1811), 14 East 423; 104 E. R. 665; *Wilkinson v. Johnson* (1824), 3 B. & C. 427; 107 E. R. 792; *Bamberger v. The Commercial Credit* (1855), 15 C. B. 676, per Maule, J., 693; 139 E. R. 590, 597.

(f) *Ubi supra*.

cancelled by removing or defacing the seal; a signed instrument by cancelling the signature, and an instrument of any kind by any other form of obliteration indicating an intention to discharge the other party.

An obligation arising from an instrument may likewise be discharged by the promisee's delivering up the instrument to the promisor with the intention of releasing the promisor (g).

No consideration is necessary to support the cancellation of an instrument or its discharge by delivery to the party bound by it. The rules on this matter, which were originally developed in relation to deeds, were established in the law before the doctrine of consideration was settled in its present form and have survived notwithstanding the subsequent growth of that doctrine. They were based on the identification of the obligation with the instrument creating it (h); and indeed originally this identification was carried so far that if the instrument ceased to exist or were defaced accidentally the obligation created by it was nevertheless discharged. This, however, is no longer law and cancellation must now be *animo cancellandi* to discharge the obligation (i).

So far as bills of exchange, cheques and promissory notes are concerned, the law as to discharge by cancellation is now declared in the Bills of Exchange Act, 1882 (k). In the Act discharge by the holder's delivering up the bill, cheque or note to the party liable is treated as a form of renunciation, a matter which we shall notice in the next succeeding paragraph.

Renunciation. By the Bills of Exchange Act, 1882 (l), the liability of a party on a bill of exchange, cheque, or promissory note will be discharged if the holder unconditionally renounces his rights against that party either in writing or by the delivery to him of the instrument.

Disclaimer. We have seen that a deed binds the maker of it from the moment of its execution and does not require the assent of the covenantee to render it operative (m). A person cannot, how-

(g) Shep. Touch. 70; *Richards v. Symes* (1740), Barn. Ch. 90; 27 E. R. 567, *Barton v. Gainer* (1858), 3 H. & N. 387, per Martin, B., 388, 157 E. R. 520, 521. See Halsbury, *op. cit.*, vol. 10, p. 226 and p. 186, note (e).

(h) Cf. p. 573, *post*.

(i) Shep. Touch. 69; Norton, *Deeds* (2nd ed.), 47-8.

(k) Ss. 64, 73, 89.

(l) Ss. 62, 73, 89.

(m) *Ante*, pp. 13 *et seq.*

ever, be compelled to accept a benefit against his will (*n*), and when a covenantee who has not assented to a deed learns of it he may disclaim the covenant and thereby discharge the covenantor (*o*). Such a disclaimer may be by deed, words or other conduct (*p*). Once the covenantee has assented to the covenant, however, his right of election is determined and he may not thereafter disclaim (*q*).

Contract not to Sue. A contract, whether by deed or simple agreement on consideration (*r*), not to sue will amount to a discharge in one case only, *viz.*, where it is unconditional and unlimited in point of time (*s*). In such a case the damages recoverable in a cross-action by the debtor against the creditor would be the same as those recoverable by the creditor against the debtor and to avoid circuity of action the contract not to sue may be pleaded as a release. Where, however, the contract not to sue is conditional, or limited in point of time, the damages for breach of it would not necessarily be the same as those recoverable by the creditor, and it does not therefore operate as a release, but the debtor is left to bring a cross-action or counter-claim (*t*).

The principle of construing a general contract not to sue as a release, and the rule that a release by a joint creditor or of a joint or joint and several debtor operates to discharge the debt as between all parties (*u*), may not be combined so that a contract by a joint creditor not to sue or a contract not to sue a joint or joint and several debtor would operate to effect a discharge as between all parties. It has long been settled that a contract not to sue in such circumstances can have no other operation than its actual terms demand. Not being in terms a release it will not be construed as a release where to do so would be productive of manifest injustice. As was said by Lord Kenyon in a case where an obligee of a bond covenanted not to sue one of two joint obligors, and the other attempted to plead the covenant as a complete discharge of the

(*n*) *Peacock v. Eastland* (1870), L. R. 10 Eq. 17, 20; *Naas v. Westminster Bank*, [1940] A. C. 366, 403.

(*o*) *Whelpdale's Case* (1604), 5 Co. Rep. 119 a; 77 E. R. 239; Sheppard's Touchstone (Preston's ed.), 70, 284-5.

(*p*) *Foster v. Dawber* (1860), 1 Dr. & Sm. 172; 62 E. R. 343.

(*q*) Sheppard's Touchstone, *ubi supra*; *Naas's Case* (*supra*) at p. 401.

(*r*) *Ford v. Beech* (1848), 11 Q. B. 842, 871, 116 E. R. 689, 700.

(*s*) *Ford v. Beech* (*supra*); *Ray v. Jones* (1865), 19 C. B. (N.S.) 416; 144 E. R. 848.

(*t*) *Ray v. Jones* (*supra*).

(*u*) See pp. 385-7, *ante*.

bond (x), "I had only been doubting, in my own mind, on the strict law of the case; for that the honesty and justice of it are with the plaintiff cannot be doubted".

Merger. We have seen (y) that a contractual obligation may be dissolved by way of accord and satisfaction if the promisee agrees with the promisor to accept a new contract in absolute discharge of the original obligation. In such a case the discharge of the old obligation takes place pursuant to the express will of the parties. To be distinguished from this is the discharge by merger which *prima facie* occurs where a party being already bound to another by simple contract enters into a covenant with that other in the same (z) terms. In such a case the simple contract merges in and is discharged by the covenant notwithstanding that there may be no expressed intention that that should happen. The declared will of the parties operates in such a case to discharge the earlier obligation not because it is expressly directed to that end but because it is directed to an end which the law regards as necessarily involving (in the absence of any expression of a contrary intention) the discharge of that obligation (a). If, however, it should appear from the deed, interpreted in the light of any relevant extrinsic evidence (b), that the parties did not intend that merger should occur this intention will displace the ordinary rule of law and the two contracts will exist concurrently, the later being a collateral security for the earlier (c). Such an intention may be inferred from the introduction of additional parties in the second contract, as where A and B enter into a bond with C in respect of B's existing simple contract indebtedness to C (d).

§ 180. Acceptance by Creditor of Promise or Payment from Third Party in Satisfaction of Claim Against Debtor; Compositions with Creditors

It has been held that a creditor who has received from a third party a payment which he agrees with the third party to accept in

(x) *Dean v. Newhall* (1799), 8 T. R. 168, 171; 101 E. R. 1326, 1328. See also *Walmesley v. Cooper* (1839), 11 A. & E. 216; 113 E. R. 398.

(y) See pp. 498 *et seq.*, *ante*.

(z) *Norfolk Ry. v. McNamara* (1849), 3 Ex. 628; 154 E. R. 996; *Boaler v. Mayor* (1865), 19 C. B. (N.S.) 76; 144 E. R. 714; *Commissioner of Stamps v. Hope*, [1891] A. C. 476, 483.

(a) *Price v. Moulton* (1851), 10 C. B. 561; 138 E. R. 222.

(b) Cf. *Owen v. Homan* (1851), 3 Mac. & G. 378, 408-11; 42 E. R. 307, 319-20.

(c) *Twopenny v. Young* (1824), 3 B. & C. 208; 107 E. R. 711; *Boaler v. Mayor*, *supra*; *Commissioner of Stamps v. Hope*, *supra*.

(d) *Holmes v. Bell* (1841), 3 Man. & G. 213; 133 E. R. 1120

satisfaction of the debt is thereby precluded from afterwards suing the debtor for any difference between the debt and the payment by the third party (*e*). It has also been held that a composition with creditors, *i.e.*, an agreement whereby each creditor agrees with the debtor and the other creditors to accept payment of a rateable proportion of his debt in satisfaction of the whole, precludes any individual creditor from afterwards suing the debtor for the full amount of his debt contrary to the terms of the composition; and this apart from the provisions of the Bankruptcy Acts, and even though the composition is not by deed (*f*). In each of these cases it is clear that there is consideration as between the parties other than the debtor; in the first case, as between the creditor and the third party; and in the second as between the creditors *inter se* (*g*). In the second case, indeed, it may sometimes be that there is also consideration as between the debtor and his creditors, for the debtor may, for example, have arranged the composition and secured the adherence of the other creditors to it, or otherwise have provided some new consideration (*h*). But where this is not so, both cases present the common difficulty that in neither is the debtor a party to the consideration which subsists as between the other parties. Nevertheless the Courts, even Courts having a purely common law jurisdiction (*i*), refuse to allow a creditor who has become a party to such an arrangement subsequently to sue the debtor in contravention thereof (*k*).

It is, in fact, quite impossible to reconcile these cases with the ordinary common law rules as to consideration, and they must be taken to constitute an exception to those rules. The basis of this exception has been repeatedly said to be fraud. It would be a fraud as against the third party or the other creditors if, after accepting such an arrangement, a creditor could sue the debtor for the full amount of his debt. As was said by Abbott, C.J., in a case in which a creditor, having accepted from his debtor's father £9 in satisfaction

(*e*) *Welby v. Drake* (1825), 1 C. & P. 557; 171 E. R. 1315; *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330.

(*f*) *Pfleger v. Browne* (1860), 28 Beav. 391; 54 E. R. 416; *Slater v. Jones* (1873), L. R. 8 Ex. 186, *per* Bramwell, B., 192-3.

(*g*) *Good v. Cheeseman* (1831), 2 B. & Ad. 328, *per* Lord Tenterden, C.J., 334, 109 E. R. 1165, 1167.

(*h*) Cf. the explanation by Horridge, J., in *West Yorkshire Darracq Agency, Ltd. v. Coleridge*, [1911] 2 K. B. 326, 328; cf. *Good v. Cheeseman* (*supra*), and *Boyd v. Hind* (1857), 1 H. & N. 938; 156 E. R. 1481.

(*i*) *Welby v. Drake* (1825), 1 C. & P. 557; 171 E. R. 1315 (Abbott, C.J.); see also Willes, J.'s statement of the law in *Cook v. Lister* (1863), 13 C. B. (N.S.) 543, 595; 143 E. R. 215, 235.

(*k*) *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330.

of a debt of £18 3s. 11d., afterwards sued the debtor for the balance (l): "If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability".

How, then, could such a defence be made available to the debtor in a common law Court? This question is thus answered by Fletcher Moulton, L.J. (m): "The way in which this is worked out in law may be that it would be an abuse of the process of the Court to allow the creditor under such circumstances to sue, or it may be, and I prefer that view, that there is an extinction of the debt. . . ." Farwell, L.J., while agreeing with this, added (n): "If there be any difficulty in formulating a defence at common law in such case, I have no hesitation in saying that a Court of equity would have regarded the plaintiffs as disentitled to sue except as trustees for the . . . [third party] and would have restrained them from suing under such circumstances as existed in the present case".

It is submitted, therefore, that the effect of the authorities may be thus stated. If A is bound by an obligation to B and B contracts with X for valuable consideration to forgo all or part of his claim against A, then so long as this contract subsists (o) B may not sue A in contravention of it, for this would be a fraud on X; and this fraud may be relied upon by A as a defence to an action against him by B.

(l) *Welby v. Drake* (*supra*).

(m) *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330, 339.

(n) *Ib.* 342.

(o) Cf. *Slater v. Jones* (1873), L. R. 8 Ex. 186, 190.

CHAPTER XXI

THE DISSOLUTION OF A CONTRACT BY FRUSTRATION

§ 181. Kinds of Frustration; Impossibility of Performance and Failure of Purposes

The purpose of the present chapter is to consider the effect of what is known in the modern language of the law as the frustration of a contract. By frustration is meant impossibility in the fulfilment of the purposes of the parties in entering into the contract. These purposes have been frustrated, disappointed, and made vain by some unknown or unanticipated circumstance or change of circumstance. The question for consideration is whether and how far the contract remains binding and operative notwithstanding this failure of the object with which it was made. The most important and familiar example of such frustration is that of impossibility in the performance of the obligations of the contract. By some unknown circumstances or unanticipated change of circumstance a contractual obligation assumed in the belief that it was possible of performance turns out to be impossible. Is the promisor thereby excused in law, since the purpose of the contract can no longer be fulfilled, or does he remain nevertheless liable to pay damages as for breach of contract in failing to do that which he promised to do?

Impossibility of performance, however, is only one kind of frustration. A second kind exists where, though performance of the obligations of the contract may remain perfectly possible, nevertheless the ulterior purpose for which the contract was made is impossible of fulfilment. The performance of the contract, though in itself possible, would be futile as failing to meet the purpose for which the contract was made, or would conflict with that purpose. In such a case, is the party bound to perform his obligation, or can he excuse himself for the breach of it or rescind the contract, on the plea that the intent with which he entered into the contract has been frustrated and become vain?

The distinction which has been indicated may be illustrated as follows. X makes a contract to hire from Y on a certain day a room from which he may view the Coronation procession of King Edward VII appointed to take place on that day. Such a contract

may be frustrated in either of the two ways which we have mentioned. In the first place, the room in question may, before the appointed day, be destroyed by fire. In this case Y is unable to perform his obligation to provide X with the use of the room. The contract has become impossible of performance on the part of Y, and has become frustrated accordingly (a). In the second place, and alternatively, the Coronation procession appointed for that day may be abandoned because of the illness of the King. Performance of the contract has not, however, for this reason become impossible. Each party remains fully able to perform his own contractual obligation. It is still possible for Y to give X the use of the room (procession or no procession), and it is still possible for X to pay for it. But though performance of the contractual obligations remains possible, fulfilment of the contractual purpose has become impossible. The room, as both parties knew, was hired for one purpose only, and this purpose has failed. The contract, therefore, has become frustrated, not in the sense that performance has become impossible, but in the sense that performance would not fulfil the essential purpose with which the contract was made (b).

The term impossibility is sometimes used in this connection in a generic sense to include frustration in both of these forms—to include not merely impossibility in the performance of the contract, but also impossibility in the fulfilment of the ulterior purpose which performance was intended to serve. It is more convenient, however, and less ambiguous to confine the term impossibility to impossibility of performance, and to use the term frustration as a generic expression including both impossibility of performance and failure of the purpose underlying performance.

§ 182. Frustration is in General Irrelevant

The general rule is that frustration in both its forms is wholly irrelevant and inoperative with respect to the validity of the contract. In general, he who promises a thing is bound by his promise and must either perform it or pay damages for non-performance. That performance is impossible is no excuse. If he cannot perform his obligation, he can at least pay in damages the equivalent of performance. He who promises to do a thing does not merely promise to do his best to do it; he enters into an absolute undertaking that the thing will be done in any event, and that if it is not

^(a) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 122 E. R. 309.

^(b) *Krell v. Henry*, [1903] 2 K. B. 740.

done he will pay its equivalent. Similarly, he who enters into a contract for a certain purpose is bound to perform the contract, irrespective of whether this purpose can be fulfilled or not (c). His promise is absolute, and not dependent on fulfilment of the purposes with which he made it. To any plea of frustration in either kind the promisee can commonly reply that he is in no way concerned with the question whether performance of the promise is possible, or whether the purposes of the promisor have been fulfilled. He stands upon the promise made, and requires either performance or its equivalent in money. The truth of this general principle of absolute liability for breach of contract, even though that breach is the inevitable result of impossibility of performance, is not affected by the circumstance that in exceptional cases the obligation undertaken by the promisor is in its express words or by its legal interpretation limited to an obligation to do his best. A physician or surgeon who undertakes the treatment of a patient does not promise to cure him; he undertakes merely to use reasonable care and skill to that end. A railway company which contracts to carry a passenger from London to Edinburgh does not undertake that no accident will happen on the way, but merely undertakes that all reasonable care will be taken of him during his journey. But, in general, liability for the breach of contract is absolute, and is not, like liability for tort, dependent on wrongful intent or negligence. He who enters into a contract for the sale and delivery of merchandise commonly undertakes that he will deliver it in all events, and not merely that he will deliver it unless prevented by inevitable accident or otherwise without his own wilful or negligent default. So he who contracts to buy goods for a particular purpose, even a purpose expressly disclosed to the seller, commonly undertakes and is bound to accept the goods in all events, even though that purpose may have wholly failed and though his contract is frustrated accordingly.

§ 183. Exceptions to this Rule

There are, however, extensive exceptions to this general principle that the frustration of a contract by impossibility of performance or otherwise is irrelevant and inoperative.

(c) *Paradine v. Jane* (1647), Aleyn 26; 82 E. R. 897; *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K. B. 683; *Leiston Gas Co. v. Leiston-cum-Sizewell U. D. C.*, [1916] 2 K. B. 428; *Matthey v. Curling*, [1922] 2 A. C. 180; *New System Telephones v. Hughes & Co.*, [1939] 2 A. E. R. 844; *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A. C. 154, per Lord Russell, 176; per Lord Wright, 184; cf. per Lord Porter, 203-4; *Cricklewood Property and Investment Trust, Ltd. v. Leightons Investment Trust, Ltd.* (1945), 61 T. L. R. 202, H. L.

(1) Contract Impossible Ex Facie.

In the first place, there are, in legal theory at least, if not in practice, cases in which the contract is on the face of it impossible of performance and therefore absurd and invalid. Such contracts are void because not based on any genuine contractual intention, and because the impossible promise of the one party does not amount to that valuable consideration which is necessary to render binding the promise of the other party. If X promises to pay Y £100 to-morrow in consideration of the promise of Y to walk across the English Channel next week, the contract is wholly void as impossible on the face of it. The rule of law requiring valuable consideration for a contract cannot be evaded by the device of giving nugatory promises impossible of fulfilment in exchange for undertakings which are possible. In order that this rule shall apply, however, the contract must be so obviously impossible on the face of it, having regard to the common knowledge and understanding of mankind, as to justify the inference that there was no genuine contractual intention underlying the promise (*d*). The law does not undertake in any other sense or to any other extent to determine what things are possible in nature and what things are not. The process of science and invention consists in showing that things are possible to-day which yesterday were deemed impossible. In *Coke on Littleton* the example given of an impossible promise is a promise to go from London to Rome in three days (*e*).

(2) Express Condition as to Frustration.

In the second place, contracts may be made expressly subject to the absence of frustration by impossibility of performance or failure of purpose (*f*). A manufacturer may expressly qualify his undertaking to deliver the goods by providing for the case of impossibility arising from inevitable accident, industrial disturbances, absence of shipping, shortage of raw materials, or otherwise. So bills of lading restrict the absolute liability of the shipowner by containing a list of excepted perils for which he is not to be responsible in the absence of negligence. Similarly, a purchaser may expressly make his obligation to accept the goods conditional on fulfilment of the purpose for which he requires them.

(*d*) *Clifford v. Watts* (1870), L. R. 5 C. P. 577.

(*e*) Fol. 206 b.

(*f*) A recent and interesting illustration is afforded by *Kawasaki, etc. v. Bantham S.S. Co.*, [1939] 2 K. B. 544.

(3) Implied Condition as to Frustration.

Thirdly and lastly, there are many important cases in which the frustration of a contract, by impossibility of performance or otherwise, releases the parties from their obligations by virtue of an implied condition read into the contract by the law. In such cases the law imports into the contract a condition derived by way of necessary implication from the consideration that the parties, although they have not expressed themselves to that effect, must be taken to have intended their contract to be conditional on the existence or continued existence of some state of facts contemplated by the parties as the necessary foundation and presupposition of the contract. If this state of things does not in truth exist, or does not in fact continue to exist, the contemplated basis of the contract fails, and the contract itself fails along with it. In other words, the law reads the contract in all such cases as subject to the implied condition *rebus sic stantibus*—the *res* in question being the things whose existence must be taken to have been contemplated by both parties as the agreed basis of their contractual relationship (g).

§ 184. Initial and Supervening Frustration

With reference to this implied condition, it is to be observed that the frustration of a contract is of two kinds: it is either initial or supervening. Initial frustration exists when the assumed basis of the contract is already absent on the making of the contract, the essential facts contemplated as then existing and necessary for the performance of the contract or the fulfilment of its purposes being in truth non-existent. Supervening frustration exists when by some subsequent and unanticipated change of circumstance the position is so altered that performance of the contract or fulfilment of its purposes has become impossible. Recurring to the illustration of the room hired in order to view the Coronation procession, if the building had, unknown to the parties, been already destroyed by fire at the date of the contract the case would have been one of initial frustration by impossibility of performance. If the date or route of the procession had already been changed, unknown to the parties, the case would have been one of initial frustration by a failure of the purpose of the contract. If the building was burnt down after the contract but before the date of the procession the case would have been one of supervening frustration by impossibility of performance.

(g) A clear exposition of the principle upon which the implication of a condition against frustration is made is given by Singleton, J., in *New System Telephones v. Hughes & Co.*, [1939] 2 A. E. R. 844, 852.

And if the date or route of the procession were changed after the making of the contract the case would have been one of supervening frustration by failure of the purpose of the contract.

The case of initial frustration is merely an example of that essential error, *error in essentia*, which we have already considered in a former chapter (*h*) as invalidating a contract by reason of the operation of an implied condition to that effect. The contract was entered into under a mistake as to the present existence of an essential fact recognised by the law as the foundation of the contract, and by its non-existence the contract is invalidated accordingly.

Supervening frustration, on the other hand, is not a case of a contract made in error as to the existing circumstances and invalidated thereby *ab initio*. It is the case of a valid contract based on the assumption that certain facts will exist in the future and therefore by implication of law made conditionally on this assumption. The contract thus initially valid becomes subsequently invalid by supervening impossibility of performance or supervening failure of the purposes of the contracting parties. In the case of initial frustration the implied condition *rebus sic stantibus* relates to the state of things existing at the date of the contract; in the case of supervening frustration there is likewise a condition, but it relates to some state of things expected to be in existence thereafter.

§ 185. When Condition as to Frustration Implied

The general principle upon which the implied condition of *rebus sic stantibus* is imported by law into a contract is thus explained by Lord Loreburn in *Tamplin Steamship Co. v. Anglo-Mexican Products Co.* (*i*): "A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree. . . . When our Courts have held innocent contracting

(*h*) See pp 219 *et seq.*, *ante*

(*i*) [1916] 2 A. C. 397, 403-404.

parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them, I think, that was at bottom the principle upon which the Court proceeded. It is, in my opinion, the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. . . . Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'if that happens, of course, it is all over between us' ? "

Two requisites must be fulfilled by a contract before this implied condition against frustration can be read into that contract by the law. In the first place, there must be nothing in the express terms of the contract which is inconsistent with the implied condition proposed to be imported into it (*k*). In the second place, the implied condition must be based on, and justified by, a necessary implication that, if the parties had actually contemplated the event as it has happened, they would have made with respect to that contingency an express provision equivalent to the implied condition. In the words of A. T. Lawrence, J., in the *Scottish Navigation Co.'s Case* (*l*), approved by Lord Sumner in *Bank Line, Ltd. v. Capel & Co.* (*m*), "No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document " (*n*).

(*k*) *Per* Lord Parker in *Tamplin S.S. Co. v. Anglo-Mexican Products Co.*, quoted p. 523, *post*.

(*l*) [1917] 1 K. B. 222, 249.

(*m*) [1919] A. C., at p. 460.

(*n*) In *Bell v. Lever Bros., Ltd.*, [1932] A. C. 161, 226, Lord Atkin, speaking of both frustration and essential error, said: "Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts".

It follows from these considerations that if the parties can be shown to have adverted to the possibility of a change of circumstances and nevertheless refrained from making any provision in respect thereof the case will not be within the doctrine of frustration (o). Furthermore, it would be quite inappropriate to imply a frustration condition where the object of the contract has been defeated by the wilful act of the party seeking to escape from the contract (p) (q), or by breach of the contract by either party (q). A contract may indeed be dissolved for breach but, as we shall see (r), the method and consequences of such dissolution are in divers respects different from those resulting from dissolution by reason of frustration. Where a party contends that a contract *prima facie* frustrated is nevertheless valid on the ground that the frustration was brought about by the wilful act or breach of contract by the other party, the burden is upon the party so contending to establish his contention, not upon the other party to disprove it (s).

§ 186. Essential and Non-Essential Frustration

Frustration which in accordance with the foregoing principles puts an end to contractual obligations in pursuance of an implied condition to that effect may be conveniently termed *essential* frustration. In all other cases the frustration is *unessential* or *non-essential*, and leaves the contract unaffected and fully enforceable in accordance with its express terms. The distinction so drawn between essential and unessential frustration corresponds exactly to that which has been drawn in a former chapter (t) between essential and unessential error, and also to a distinction which will be hereafter (u) adverted to between essential and unessential breach of contract. Any error, frustration, or breach is essential if it renders

(o) *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1930] Ch. 274; *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524, 529; *Chandler Bros. v. Boswell*, [1936] 3 A. E. R. 179, 186-7; *New System Telephones v. Hughes & Co.*, [1939] 2 A. E. R. 844, 852. In so far as *W. J. Tatem, Ltd. v. Gamboa*, [1939] 1 K. B. 132, would lead to a different conclusion it is submitted that it is wrongly decided. See *Court Line, Ltd. v. Dant & Russell Inc.*, [1939] 3 A. E. R. 314, 317.

(p) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, *cit. supra*, pp 529-30.

(q) *Aerial Advertising Co. v. Batchelors Peas*, [1938] 2 A. E. R. 788; *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A. C. 154, 160-1, 166, 179, 195, 205.

(r) Chap. XXII, p. 534, *post*.

(s) *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, *cit. supra*.

(t) See p. 221, *ante*; *Bell v. Lever Bros., Ltd.*, [1932] A. C. 161, *per Lord Atkin*, 226-7.

(u) See p. 538, *post*.

the contract void or voidable by the operation of a condition express or implied to that effect; unessential if there is no such condition, so that the contract, notwithstanding such error, frustration, or breach is neither avoided nor made voidable. The term "essential" signifies that the error, frustration, or breach relates to the essence of the contract; and the question as to what relates to the essence of the contract, and what does not, is to be answered in all cases by reference to the express or implied conditions of the contract.

Essential frustration is either complete or partial. Complete essential frustration is that which has the effect of putting an end to the entire contract. Partial essential frustration is that which affects merely some particular obligation of the contract, leaving the contract itself subsisting and enforceable. A contract of personal service for a fixed period is subject to the implied condition that the servant shall continue during that period to live and to retain sufficient health to enable him to perform his duties (x). The death of the servant is a case of complete essential frustration, and puts an end to the entire contract. But his casual and temporary illness is merely a case of partial essential frustration; it excuses the servant during the duration of his illness, and prevents his absence from duty from amounting to a breach of contract; but it does not entitle either the servant or the master to repudiate the entire contract (y). The permanent incapacitating illness of the servant would amount to complete essential frustration determining the contract entirely. In intermediate cases of continued illness of uncertain duration the question as between complete or partial frustration would have to be determined by reference to special considerations drawn from the nature and purposes of the particular contract. If the circumstances are such as to justify the law in imputing to the parties, by way of necessary implication, an intention that in case of illness of such duration and nature the contract is to be determined, the contract will be held determined accordingly, and the case will be one of complete frustration. If, on the other hand, the proper implication is merely that the servant shall be excused for absence from duty, but that his contract of service shall continue, the case is one of partial essential frustration only (z).

(x) See p. 520, *post*

(y) *Cuckson v. Stones* (1858), 1 E. & E. 248; 120 E. R. 902. As to whether the servant's temporary illness excuses the master from paying wages during the period of the illness see *ibid.*, and *Marrison v. Bell*, [1939] 2 K. B. 187; *Petrie v. MacFisheries, Ltd.*, [1940] 1 K. B. 258; *Hancock v. B. S. A. Tools, Ltd.*, [1939] 4 A. E. R. 538; *O'Grady v. M. Saper, Ltd.*, [1940] 2 K. B. 469; *Minnevitck v. Cafe de Paris*, [1936] 1 A. E. R. 884.

(z) *Poussard v. Spiers & Pond* (1876), 1 Q. B. D. 410.

Classes of Case. Cases of essential frustration are divisible into two classes, in accordance with the nature of the rule of law by which they are established. In some cases the law has succeeded in developing a definite rule applicable to all contracts of a certain kind, and importing into such contracts an implied condition with respect to their frustration in defined ways. Such rules are specific derivatives from the general principle of interpretation on which the doctrine of essential frustration depends. In other cases it is not possible to develop any such specific and determinate rule, but the matter is left to be dealt with under the general principle itself, the condition of *rebus sic stantibus* being imported into the individual contract by way of necessary implication as to the constructive intention of the parties, as ascertained from the terms of the individual contract, the purposes which underlie it, and the circumstances in which it was made. Thus it is a definite and specific rule of law that a contract of personal service is subject to an implied condition as to the death of either party, and that a contract *de certo corpore* is subject to an implied condition as to the destruction of its subject-matter (the rule in *Taylor v. Caldwell* (a)). On the other hand, the cases in which a contract of service is dissolved by the illness of the servant, and the cases in which a mercantile contract such as a charterparty is dissolved by unanticipated delays or difficulties in its performance, are left to be determined, not by specific, definite rules, but merely by a legal implication as to the presumed intention of the parties in the individual instance. The question in these latter cases is largely one of degree, and does not admit, therefore, of being resolved by the application of any more definite and subsidiary rule. Even in these cases, however, it is to be understood that the intention so imputed to the parties is a constructive intention imputed to them by the law—the intention which by necessary implication the law presumes that the parties would as reasonable men have formed and expressed had the contingency been actually contemplated by them and made the subject of express provision at the time when the contract was made. In the case of essential frustration, as in all other cases of implied conditions, the condition so implied is not the result of an inference of fact as to the actual intention of the parties, but is the result of an inference of law as to their constructive intention. The question

(a) (1863), 3 B. & S. 826; 122 E. R. 309

whether such a condition is to be read into the contract is a question of law for the Court, not a question of fact for the jury (*b*).

§ 187. Illustrations of Essential Frustration

The doctrine of essential frustration is established and illustrated by the following authorities.

In *Taylor v. Caldwell* (*c*) the defendants, being the owners of the "Surrey Gardens and Music Hall", agreed to permit the plaintiffs to have the use of the gardens and music hall on certain days for the purpose of giving concerts therein. Before the first of the days so appointed the music hall was destroyed by fire, so that the concerts had to be abandoned after the plaintiffs had incurred considerable expense in preparations. The plaintiffs sued the defendants for damages for breach of their contract in failing to give the plaintiffs the use of their music hall. It was held by the Court of Queen's Bench that the plaintiffs had no cause of action, the contract, though in terms absolute, being subject to a condition implied by the law that the hall should be in existence and in a fit condition for the purposes of the contract at the time when performance of the contract became due. Blackburn, J., delivering the judgment of the Court, speaks as follows (*d*): "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthen-some or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach,

(*b*) *Re Comptoir Commercial Anversois & Power, Son & Co.*, [1920] 1 K. B. 868.

(*c*) (1863), 3 B. & S. 826; 122 E. R. 309.

(*d*) At pp. 833-834, 839; E. R. 312, 314. The italics are not in the original.

performance becomes impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. . . . *The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.* In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel”.

In *Clifford v. Watts* (e) the same principle was applied, not to a case of supervening impossibility because of the destruction of the *certum corpus* to which the contract related, but to a case of initial impossibility because of the non-existence of the *certum corpus* at the date of the contract. The defendants had taken a lease of certain land from the plaintiffs for the purpose of digging clay therefrom, and had covenanted to pay the plaintiffs a royalty of half-a-crown for every ton of clay so dug, and also that they would dig not less than 1,000 tons in every year. They dug less than 1,000 tons, and the plaintiffs sued them for damages accordingly. The defendants pleaded that there was not so much clay in existence on the property. This was held a good plea, the covenant, though absolute in form, being read as subject to the implied condition that sufficient clay existed. This is that form of essential frustration which is at the same time essential error. It was said by Brett, J.: “It is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted. But here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there; and the covenant is applicable

(e) (1870), L. R. 5 C. P. 577.

only if there be clay; it does not amount to a warranty on the part of the grantee that there was clay, or to an engagement to pay the royalty although it should turn out that there was none" (f).

In *Howell v. Coupland* (g) the principle was applied to the failure of the *certum corpus* of the contract to come into existence. A vendor agreed to sell 200 tons of potatoes to be grown upon his land. The crop failed owing to the potato-blight, and the vendor was unable to deliver more than eighty tons. He was held not liable in damages for failure to deliver the residue. The contract was to deliver 200 tons off particular land, not 200 tons of potatoes simply.

As indicated in *Taylor v. Caldwell* (h) itself, a similar rule is applicable to contracts of personal service which are frustrated by the death or incapacity through illness of the person by whom the service is to be rendered. By a contract of personal service is meant in this connection any contract which must be performed in person, if at all, and cannot be performed by an agent. Thus, in *Robinson v. Davison* (i), the plaintiff made a contract with the defendant that the defendant's wife should play the piano at a concert to be given by the plaintiff on a specified day. On that day the lady was unable through illness to attend the concert. It was held that her failure to do so gave no cause of action to the plaintiff. The defendant was excused by an implied term in the contract. Kelly, C.B., quoted with approval the following passage from a judgment of Pollock, C.B., in *Hall v. Wright* (k): "There are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that if the author became insane, or the painter paralytic, and so incapable

(f) *Ibid.*, at p. 588. In the case of *Hills v. Sughrue* (1846), 15 M. & W. 253; 153 E. R. 844, a charterer agreed that the ship should proceed to a certain island, and that he would there furnish a full cargo of guano; and it was held to be no defence to an action for damages by the shipowner that there was not enough guano on the island to make a full cargo. If this case is consistent with *Clifford v. Watts*, it is because, on the construction of the charterparty, the undertaking to furnish the guano amounted to a warranty that the guano existed.

(g) (1876), 1 Q. B. D. 258.

(h) (1863), 3 B. & S. 826, 835; 122 E. R. 309, 313.

(i) (1871), L. R. 6 Ex. 269.

(k) (1858), E. B. & E. 746, 793-4; 120 E. R. 688, 706.

of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death " (l).

In *Krell v. Henry* (m) the doctrine of essential frustration was extended to cases in which the contract is frustrated, not by supervening impossibility of performance, but by supervening impossibility of the fulfilment of the purposes with which the contract was made. The defendant, by a contract in writing, agreed to hire the plaintiff's flat in Pall Mall for June 26 and 27, on which days it was assumed that the Coronation procession of King Edward VII would take place and would pass along Pall Mall. The contract contained no express reference to the procession, or to any other purpose for which the flat was to be taken. The purpose of the contract was, however, known to both parties. The Coronation was postponed owing to the sudden illness of the King, and the defendant did not use the plaintiff's flat and declined to pay the agreed rent for it. It was held by the Court of Appeal that, by an analogical extension of the rule in *Taylor v. Caldwell* (n), the contract was to be read subject to the implied condition that the procession would take place on the day appointed, and that this implication could be derived from the circumstances of the case as known to the parties, although there was no basis for it in the terms of the written contract itself. While there can be no doubt as to the soundness of the conclusion in this case, the reasoning of the Court is open to the observation that the case was dealt with as if it was one of impossibility of performance, as in *Taylor v. Caldwell*, which it clearly was not (o).

In *Jackson v. Union Marine Insurance Co.* (p) a shipowner in November, 1871, entered into a charterparty, by which the ship was to proceed with all possible despatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The ship, in the course of her voyage to Newport, ran aground on January 3, 1872, and the time necessary for getting her off and repairing her extended to August of that year. In the meantime, on February 15, the

(l) (1871), L. R. 6 Ex., at pp. 274-5. See also *Boast v. Firth* (1868), L. R. 4 C. P. 1; *Poussard v. Spiers & Pond* (1876), 1 Q. B. D. 410; *Stubbs v. Holywell Railway* (1867), 2 Ex. 311; *Southern Foundries v. Shirlaw*, [1940] A. C. 701, 721 (m) [1903] 2 K. B. 740.

(n) (1863), 3 B. & S. 826; 122 E. R. 309.

(o) Other "Coronation cases" are *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K. B. 683; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756; *Chandler v. Webster*, [1904] 1 K. B. 493; *Elliott v. Crutchley*, [1906] A. C. 7.

(p) (1874), L. R. 10 C. P. 125.

charterer had abandoned the charter and chartered another ship to carry the rails to San Francisco. It was held by the Court of Exchequer Chamber that the charterer's action in so abandoning the charter was justified by the delay, and that he was not liable for the hire of the ship. It is to be observed that in this case the shipowner's delay in getting his ship to Newport was not a breach of his contract, since that contract was expressly made subject to dangers and accidents of navigation. Nevertheless, though the cargo owner could not complain of any breach of the contract, and had no right of action against the shipowner, he was entitled to regard the contract as at an end. The law read into the contract an implied condition that the ship must arrive at Newport in time to enable the purposes of the charterparty to be fulfilled. The delay, although it did not amount to any breach of the obligations of the contract, did amount to a breach of this implied condition of the contract, for it was so extensive as to frustrate the contract by rendering the purposes of the charterer futile and impossible of fulfilment (*q*).

A contract is to be deemed frustrated by interruption or delay once it appears that the interruption or delay will probably continue for an indefinite period or a period unreasonably long having regard to the nature and purpose of the contract. If in the event the delay should prove shorter than was anticipated this will not affect the matter (*r*). But subsequent events may sometimes assist in showing what the probabilities of delay really were (*rr*).

Cases Arising out of War. The extraordinary disturbance of commercial relations caused by war has given rise to numerous cases in which the doctrine of the essential frustration of contracts has come before the Courts for consideration.

In *Horlock v. Beal* (*s*) it was held by the House of Lords, reversing the decision of the Court of Appeal, that contracts of service for a voyage of two years entered into between seamen and shipowners were dissolved by the arrest and permanent detention

(*q*) At p. 145, Bramwell, B., compares the case with that of incapacity of a servant through illness. See Lord Blackburn's view of it in *Dahl v. Nelson* (1881), 6 App. Cas., at p. 53.

(*r*) *Court Line, Ltd. v. Dant & Russell Inc*, [1939] 3 A. E. R. 314. Cf. *Andrew Millar & Co. v. Taylor & Co.*, [1916] 1 K. B. 402, and see 56 L. Q. R. 201-205.

(*rr*) On this point and generally as to interruption or delay causing frustration see *per* Lord Wright in *Denny, Mott & Dickson v. Fraser & Co.*, [1944] 1 A. E. R. 265, 277-8.

(*s*) [1916] 1 A. C. 486.

of the ship at the port of Hamburg on the outbreak of war with Germany.

In *Metropolitan Water Board v. Dick, Kerr & Co.* (t) the same question of essential frustration again came before the House of Lords. It was there held that a contract to construct a reservoir for the Metropolitan Water Board (a work which would have taken six years in completion) was dissolved by the act of the Ministry of Munitions in ordering the contractor to discontinue and suspend the erection of the work under the authority conferred on that Ministry during the first war with Germany.

In *Tamplin Steamship Co. v. Anglo-Mexican Products Co.* (u) it was held, on the other hand, by a majority of the House of Lords, that a "time" charterparty for the term of five years for the carriage of oil by the charterer was not dissolved by the requisition by the Admiralty of the steamer during the currency of the term of the charter for the purpose of transporting troops, the shipowner contending that the charter had come to an end, and the charterers, who were willing to continue payment of the agreed freight, contending that the charter was still in existence. Lord Parker (x) speaks as follows: "It is important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself, and not on something entirely *dehors* the contract, which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency. Again, in determining whether any such term or condition can be properly implied the nature of the contract is of considerable materiality. . . . Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than

(t) [1918] A. C. 119.

(u) [1916] 2 A. C. 397.

(x) At pp. 422-423.

a condition subsequent defeating the contract when it is part performed" (y).

But the doctrine of essential frustration is not applicable so as to release the vendor in an ordinary mercantile contract for the sale of unspecified goods merely because the acquisition and delivery of the goods is rendered impossible by the absence of shipping facilities caused by war. In the case of contracts of this description the proper implication is not that the contract is conditional on the vendors being able to obtain the goods which they undertook to sell, but that as between vendors and purchasers the risk of being unable to procure the goods shall lie upon the vendors themselves. The obligation of the vendors in this respect is not conditional, but absolute (z).

Summary. The foregoing illustrations and remarks are sufficient to indicate some of the grave difficulties that exist in applying the rule as to the frustration of contracts to the facts of concrete cases, and of drawing the line between those cases in which the parties should be held bound to the performance of their contracts according to their express terms, and cases in which they may escape from their bargains because of circumstances which have not been foreseen and provided for, but are dealt with by conditions read into the contract by the law itself. Whatever the difficulties and dangers of the modern doctrine of the frustration of contracts may be, there is, however, no doubt as to the existence of that doctrine or as to its essential nature (a).

(y) Lord Parker elsewhere in his judgment (pp. 424-5) expressed the opinion that the doctrine of frustration would not in any event readily apply to a time charterparty. Nevertheless such a charterparty was held to be frustrated in the later case of *Bank Line, Ltd. v. Arthur Capel & Co.*, [1919] A. C. 435.

(z) *Blackburn Bobbin Co., Ltd. v. Allen & Sons, Ltd.*, [1918] 1 K. B. 540; [1918] 2 K. B. 467.

(a) Generally on the doctrine of frustration see McNair, *Legal Effects of War* (2nd ed.), pp. 133 ff., and the same learned author's valuable article in 56 L. Q. R. 173-207. The same volume of the L. Q. R. at pp. 519-556 also contains an interesting and acute article by H. W. R. Wade on *Impossibility in Contract*. It has sometimes been suggested that the dissolution of a contract for frustration where there is no appropriate express term does not depend on an implied term but results from the disappearance of the foundation of the contract. *E.g.*, *W. J. Tatem, Ltd. v. Gamboa*, [1939] 1 K. B. 132. The question is fully discussed by Dr. McNair in 56 L. Q. R. 172-182, and he concludes (p. 181): "I think that the balance of judicial authority is in favour of the implied term as the basis of the doctrine of frustration, and history appears to be on that side". Recent judicial statements to the same effect are in *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] Ch. 274, 280 ff. (Lord Hanworth, M.R.); *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524, 529 (P. C., per Lord Wright); *Court Line, Ltd. v. Dant & Russell Inc.*, [1939] 3 A. E. R. 314, 316-7 (Branson, J., disapproving of *W. J. Tatem v. Gamboa* on this point); *New System Tele-*

§ 188. Effects of Essential Frustration

Having considered the cases in which essential frustration takes place, we proceed to consider its consequences when it does take place. We have said already that frustration is either partial or complete, and is either initial or supervening. Partial frustration relates merely to some particular obligation comprised in the contract, but not to the contract at large. It serves merely to excuse or justify what would otherwise have been a breach of the contract, as in the case of a servant's absence from duty because of illness. But it leaves the contract itself subsisting and otherwise unaffected. Complete frustration, on the other hand, puts an end to the entire contract. It is a failure, not merely of a condition attached to any particular contractual obligation, but of a condition attached to the contract as a whole, as in the case of the death of a servant, or the destruction of the subject-matter of the contract. Complete frustration is either initial or supervening; that is to say, it either exists at the time when the contract is made—as when the subject-matter has already perished unknown to the parties—or it arises subsequently by reason of some change of circumstances, as when the subject-matter of the contract is subsequently destroyed.

In the case of initial frustration the contract is void *ab initio*. In the case of supervening frustration the contract is avoided automatically upon the frustration occurring. The occurrence of the

phones v. Hughes, [1939] 2 A. E. R. 844, 852 (Singleton, J.); *Imperial Smelting Corp. v. Joseph Constantine S.S. Line*, [1940] 1 K. B. 812, 821, 839 (Atkinson, J.); *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A. C. 154 (un House of Lords), *per* Viscount Simon, L.C., 163: "The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties"; see also *per* Lord Wright, 186, and Lord Porter, 204-5; Viscount Maugham (p. 169) considered that "it is clear that it [the doctrine] is based upon the presumed common intention of the parties"; *Jute and General Products v. Simon & Co.*, 79 Ll. L. Rep. 79 (Viscount Caldecote, L.C.J.). Mr. Wade, in the article already cited (p. 520) considers the doctrine of the implied term the most prominent theory but himself evidently prefers the "fundamental assumption theory". See also Lord Wright in 59 L. Q. R. 124.

In *Denny, Mott & Dickson v. Fraser & Co.*, [1944] A. C. 265, Lord Wright remarks (p. 275). "I find the theory of the basis of the rule in Lord Sumner's pregnant statement . . . that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It leaves the question what is the reason for implying a term. . . . It is not possible to my mind to say that, if they [the parties] had thought of it, they would have said, 'Well, if that happens all is over between us'. . . . I must admit that the view I have stated is somewhat heretical". A very complete and clear statement of the various theories which have been advanced to explain or support the doctrine is given by Latham, C.J., in *Scanlan's New Neon, Ltd. v. Tooheys, Ltd.* (1943), 67 C. L. R. 169, 186 ff.

frustration does not merely render the contract voidable at the election of one or other of the parties (b).

In the case of supervening frustration, is the contract determined *ab initio* or is it merely determined as from the date of frustration? The question is of great importance with respect to the rights of the parties as to acts of part performance and as to obligations which have accrued due in the interval of time which has elapsed between the making of the contract and its frustration. The answer to be given may differ accordingly as the frustration did or did not occur before July 1, 1943. In the case of frustration occurring before that date the matter falls to be determined at common law; in other cases the matter may be affected by the Law Reform (Frustrated Contracts) Act, 1943. It will therefore be convenient to consider the matter as it stands at common law and then to notice the modifications introduced by the statute.

I. Common Law; Frustration Occurring before July 1, 1943.

(A) The parties may have provided in their contract as to the consequences of the main purpose of the contract being frustrated, and if they have done so their rights and duties will be determined by this provision (c).

(B) In the absence of any such provision in the contract it is now settled at common law that, subject to the operation of the rule whereby money paid in respect of a consideration which wholly fails may be recovered, supervening frustration is not a case of determination *ab initio*, but is a case of determination as from the date of frustration (d). The contract does not become retrospectively void as if it never had been made; it merely comes to an end at the date of frustration, all intermediate acts and events being (with the exception indicated) governed by the terms of the contract as still subsisting in the period before frustration. Both parties are excused from all further acts of performance accruing due after the

(b) *Horlock v. Beal*, [1916] 1 A. C. 486; *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A. C. 497, 509-10; *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A. C. 154. Nevertheless it is not easy to see why frustration should bring about the automatic termination of the contract in cases where one party only is prejudiced. *E.g.*, why should not the party who was to take the rooms in *Krell v. Henry*, [1903] 2 K. B. 740, have been at liberty to have them notwithstanding the postponement of the procession if he had so wished? See Canadian Bar Review, vol. xix, 226-7 (book review by C. A. W.). Consider, however, *Bank Line, Ltd. v. Arthur Capel & Co.*, [1919] A. C. 435.

(c) *Fibrosa v. Fairbairn, etc., Ltd.*, [1943] A. C. 32, 43, 67, 79.

(d) *Fibrosa v. Fairbairn, etc., Ltd.*, [1943] A. C. 32. See especially *per* Lord Macmillan, pp. 59-60.

date of frustration, but (save in the excepted case) remain bound by the contract as to all obligations theretofore accrued due.

From this general principle the following consequences ensue as to the rights and liabilities at common law of the parties to a frustrated contract.

(1) **Money Paid Irrecoverable.** If any money has, in accordance with the contract, been paid by one party to the other, it cannot be recovered back merely on the plea that the contract has failed by frustration. Although, however, the doctrine of frustration does not entitle a party to recover any moneys he may have paid under the contract, there is nothing in that doctrine which requires the exclusion of the ordinary rule of the common law allowing the recovery of money paid on a consideration (including a severable part of a consideration) which has entirely failed (e). Therefore, when, by reason of the subsequent determination of the contract, the party paying the money receives no consideration inasmuch as the party receiving the payment has been freed from the performance of the obligation in respect of which the payment was made, the party making the payment may recover his money notwithstanding that the case is one of frustration (f). So the law, after being declared in a contrary sense by *Chandler v. Webster* (g), a decision of the Court of Appeal which stood (though not without adverse criticism (h)) for nearly forty years, was recently laid down by the House of Lords in *Fibrosa v. Fairbairn, etc., Ltd.* (i).

In *Fibrosa v. Fairbairn, etc., Ltd.*, an English company contracted with a Polish company for the sale and delivery to the Polish company of certain machinery at the price of £4,800 c.i.f. Gdynia. Under the contract the Polish company was to make an initial payment of one-third of the price and it paid £1,000 on account of this initial payment. Subsequently and before the time for delivery had passed the contract was frustrated by the outbreak of war between Germany, and Poland and England, and the events following on the outbreak of war. Thereupon the Polish company claimed to recover back the sum of £1,000 as money paid on a consideration which had wholly failed, inasmuch as by reason of the frustration it was not

(e) P. 376, *ante*.

(f) [1943] A. C., at pp. 64 ff.

(g) [1904] 1 K. B. 493.

(h) *Cantare San Rocco S. A. v. Clyde Shipbuilding Co.*, [1924] A. C. 226, 259-260 (*per* Lord Shaw).

(i) [1943] A. C. 32.

entitled to require delivery of the machinery, and this claim succeeded in the House of Lords.

Subject to the exception established by the last-mentioned case, however, the rule is general at common law that the loss arising from the accidental termination of a contract by frustration must lie where it falls. There is no right of *restitutio in integrum* such as would have existed had the contract been rescinded *ab initio*. In the words of Lord Macmillan (*k*), “the law of England has adopted as its general principle . . . that each party shall be left as he stood, despairing of the practicability of conjecturing and enforcing what the parties might be assumed to have agreed upon if they had contemplated and provided for the unforeseen contingency”.

(2) **Obligation to Pay Money Due and Payable.** On the general principle, if any money has already become due and payable under the contract before the date of its determination by frustration, the obligation to pay that money remains (except in one case) valid and enforceable, notwithstanding the determination of the contract. The debtor ought to have paid the money before the date of the determination of the contract; if he had actually paid it he could not have recovered it, and he cannot be in a better position because of the fact that he has failed in doing what he ought to have done in due time.

In *Stubbs v. Holywell Railway Co.* (*l*) the defendants employed S. as consulting engineer for fifteen months to complete certain works, and he was to be paid for his services the sum of £500 in equal quarterly instalments. Before the work was finished, and whilst two quarterly payments which were due to him were still unpaid, he died. It was held that his executors were entitled to recover those two quarterly payments from the defendant company.

It is to be observed that in this case there were three possible courses any one of which the common law might conceivably have adopted. The first was that the executors could recover nothing, because the contract had not been completed by the deceased. The second was that the executors could recover on a *quantum meruit* the value of the part performance actually achieved by the deceased in his lifetime. The third was that the executors could recover all payments actually due in the lifetime of the deceased—nothing more, although the value of his part performance may have been far in excess of this, and nothing less, although his part performance may

(*k*) *Ib.* 59.

(*l*) (1867), L. R. 2 Ex. 311.

and materials thereon were destroyed by an accidental fire. The contract was thereby frustrated and determined. It was held by the Court of Exchequer Chamber that the plaintiffs were not entitled to recover any part of the contract price.

So in *The Madras* (o) the plaintiffs, being tug-owners, contracted to tow the defendant's ship from one place to another for a fixed sum. They towed it nearly to the place of destination, but there, without the fault of either party, the vessel stranded on a rock and could not be got off. The contract was thereby determined by frustration through impossibility of performance. It was held that the plaintiffs, though not in fault, and although they had duly performed almost the entirety of the service contracted for, could not recover the contract price or any part thereof (p).

This rule, however (consistently with (2) above), does not apply where the contract is severable, so that by the express terms thereof, or by necessary implication therefrom partial payments have accrued due from time to time during its currency, and there has been no total failure of consideration in respect of the amounts so accrued due. In this case all payments already earned and accrued due before the determination of the contract are recoverable notwithstanding such determination. If the engineers in *Appleby v. Myers* or the tug-owners in *The Madras* had been entitled by their contract to payment on account during the performance of the work they could have recovered all payments accrued due before the destruction of the works by fire or the stranding of the ship.

In *Anglo-Egyptian Navigation Co. v. Rennie* (q) the defendants, being engineers, contracted to supply and install new boilers and other machinery in the plaintiff's steamship. The contract price was £5,800, to be paid by instalments as the work progressed. After the work was partially done, and after one instalment of £2,000 had become due and been actually paid, the ship was lost at sea, and the contract was determined by frustration. The plaintiff ship-

(o) [1898] P. 90

(p) It is to be observed that in *Appleby v. Myers* and *The Madras* the result of the frustration was to deprive the defendant of the advantage of the plaintiff's part performance of the contract. Query, however, whether a claim on a *quantum meruit* or *valebat* could not be maintained where the part performance of the plaintiff has been such as notwithstanding its partial nature to constitute a benefit to the defendant which has not been destroyed or terminated by the event causing the frustration. If, e.g., A agrees to decorate five rooms in B's house for a lump sum, and after the decoration of three rooms is completed A is called up for the army, with the result that the contract is frustrated, it is not easy to see why B should not be required to pay the reasonable value of the decoration of the three completed rooms.

(q) (1875), L. R. 10 C. P. 271.

owners sued for the recovery of the £2,000 so paid by them, on the ground that the contract had not been performed by the defendants. It was held that the amount was not recoverable. It was immaterial whether the sum of £2,000 was in excess of the value of the work actually done by the engineers or was less than that value. The engineers were entitled to this amount as due before the determination of the contract, but were entitled to no more.

II. Law Reform (Frustrated Contracts) Act, 1943; Frustration Occurring on or after July 1, 1943. This Act in part gives effect to the recommendations made by the Law Revision Committee in 1939 (r).

Until *Chandler v. Webster* (s) was overruled by *Fibrosa v. Fairbairn, etc., Ltd.* (t), it was generally thought that the severity of the rule that no adjustment could be made in respect of any loss or gain which might result from the frustration of a contract could not be mitigated even to the modest extent of invoking the common law rules as to money promised or paid on a consideration which should wholly fail. This view the decision of the House of Lords in *Fibrosa v. Fairbairn, etc., Ltd.* showed to be wrong, but even after that decision the law was in an unsatisfactory state. The test of total failure of consideration was at once too wide and too narrow. It was too wide because if a party could establish a case of total failure of consideration he might recover all that he had paid or escape payment of any part of what had accrued due from him notwithstanding that the other party had incurred expenses towards the performance of that party's side of the contract. It was too narrow because if a party had received any part of the consideration, no matter how incommensurate with the money paid by or accrued due from him, his situation was not relieved at all. Furthermore, if what a party had or should have done was something other than the payment of money the principle of *Fibrosa v. Fairbairn, etc., Ltd.* could not in any event assist him, for that principle was restricted to cases of money paid or accrued due (u).

It was to remedy such deficiencies as these that the Legislature enacted the Law Reform (Frustrated Contracts) Act, 1943. This Act introduces into this branch of the law an element of

(r) Seventh Interim Report, Cmd. 6009.

(s) [1904] 1 K. B. 493.

(t) [1943] A. C. 32.

(u) Subject to query in n. (p), p. 530, *ante*.

elasticity which even after *Fibrosa v. Fairbairn, etc., Ltd.*, it still conspicuously lacked.

The effect of the main provisions of the Act is as follows:—

(A) In so far as the parties may have provided in their contract as to the consequences of the frustration which has occurred, this provision is to take effect notwithstanding the general provisions of the Act (*x*).

(B) In so far as the parties have not provided in their contract as to the consequences of the frustration the following rules are to apply.

(1) Money paid or accrued due before the frustration of the contract may be recovered or will cease to be payable as the case may be, notwithstanding that the frustration has not brought about a total failure of consideration in respect of which the money was paid or accrued due (*y*).

The right of recovery or release from liability as thus extended is, however, subject to adjustment on account of expenses incurred in or for the purpose of the performance of the contract by the party to whom the money was paid or accrued due. If the case is one where money was paid the payee may be allowed to retain the whole or such part thereof on account of but not exceeding his expenses as is just in the circumstances; and if the case is one where money had accrued due before the frustration the party to whom it was due may be allowed to recover the whole or such part of it on account of but not exceeding his expenses as is just in the circumstances (*z*). In estimating expenses the Court may include a sum in respect of overhead expenses and in respect of any work or services performed personally by the party concerned (*a*). No account, however, is to be taken of any sum which by reason of the circumstances giving rise to the frustration may become payable to either party under any contract of insurance, unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment (*b*).

(2) The principle whereby money paid under a contract which has been frustrated may be recoverable has been extended to enable compensation to be recovered where by reason of anything done by one party in, or for the purpose of, the performance of the contract, the other party has obtained a valuable benefit other than the payment of money. In such a case the amount of compensation to be

(*x*) S. 2 (3).

(*z*) *Ib.*

(*b*) S. 1 (5).

(*y*) S. 1 (2).

(*a*) S. 1 (4).

paid by the benefited party is to be such a sum not exceeding the value of the benefit to that party as the Court considers just in the circumstances (c), including the effect in relation to the benefit of the circumstances giving rise to the frustration (d).

Expenses on the part of the benefited party are to be taken into account in the same way as they are where recovery of money paid before the frustration is sought (e). In the present case, however, such expenses are to include any sums paid by or accrued due from the benefited party to any other party prior to the frustration and retained or recoverable by that party under (1) hereof (f).

(3) When a party has entered into obligations under a contract in consideration of another party's conferring or promising to confer a benefit upon some third person, whether party to the contract or not, that benefit, so far as it is conferred before the frustration, may, if the Court thinks just in the circumstances, be regarded as a benefit conferred upon the first-mentioned party (g).

(4) In so far as the contract is severable and before frustration the severable part has been fully performed, or fully performed except for the payment of sums ascertained or ascertainable under the contract, the Court is to treat that severable part as a separate contract, and the Act is to apply to the remainder of the contract only (h).

(5) The Act does not apply (i) to any contract for the sale or sale and delivery of specified goods where the contract is frustrated by reason of the goods having perished; or (ii) where the frustrated contract is a contract of insurance; or (iii) to any charterparty, except a time or a demise charterparty; or to any contract (other than a charterparty) for the carriage of goods by sea (i).

(6) The Act binds the Crown (k).

(c) S. 1 (3).

(d) S. 1 (3) (b).

(e) S. 1 (3) (a).

(f) *Ib.*

(g) S. 1 (6).

(h) S. 2 (4).

(i) S. 2 (5). For the explanation given by the Lord Chancellor at the second reading debate on the Bill in the House of Lords as to why the group of contracts under (in) was excluded from the operation of the general provisions of the Act see 196 L. T. Jo. p. 21. At common law freight paid in advance but not earned because of the loss of the goods or ship was not recoverable unless the contract expressly so provided. *Byrne v. Schuller* (1871), L. R. 6 Ex. 319; *Fibrosa v. Fairbairn, etc., Ltd.*, [1943] A. C. 32, 42-3, 67, 79-80. Viscount Simon, L.C. (at p. 43, *ib.*), based the common law rule on a stipulation denying recoverability introduced into the contract by custom. See also *per* Lord Wright at p. 67, *ib.*

(k) S. 2 (2).

XXII

THE DISSOLUTION OF CONTRACTS BY BREACH (a)

§ 189. Rescission of Contract for Breach

Where one party to a contract has repudiated or broken all or some of his obligations under it, must the other party nevertheless perform his side or may he regard the contract as no longer binding on him? This is the main question which we shall endeavour to answer in the present chapter.

A system of law is conceivable in which a breach of contract by one party would in no way excuse the other from the performance of his part of the contract, but would merely entitle him to such remedies in reparation of the breach as might be appropriate in the circumstances. On the other hand, it is possible that the law might go to the opposite extreme and hold that a party to a contract was never bound to proceed with his performance of the contract after the other party had in any manner and to any extent broken his own obligations thereunder. Each of these extremes would, however, produce absurd and unjust results. The common law adopts neither of them, but follows instead a *via media*, some breaches of contract having the effect of rendering the contract voidable by the injured party, while others have no such effect but (if actual and not merely anticipatory) merely entitle the injured party to one or more of the remedies of debt, damages and specific enforcement according to the circumstances. In other words, there are at common law some cases in which the innocent and injured party is entitled, and others in which he is not entitled, to say to the other party: "Since you have repudiated, or have not performed all or some of your obligations under this contract I shall not perform mine".

§ 190. Rescission for Breach Based on Express or Implied Condition

A party is entitled to rescind a contract for breach thereof by the other party only in those cases in which the breach of the contractual obligation is also the breach of a condition forming an

(a) For an extremely clear and complete exposition of the law on this subject see the judgment of Jordan, C.J., in *Tramways Advertising Pty., Ltd. v. Luna Park (N. S. W.), Ltd.*, [1938] S. R. N. S. W. 632, 641-7 (reversed on other grounds 61 C. L. R. 286).

express or implied term of the contract. In other words, the only obligations whose breach justifies the rescission of the contract are those obligations which are not merely obligations but are also, expressly or impliedly, conditions of the contract—conditions, that is to say, attached expressly or impliedly to the obligations of the other party. So far as the obligations of the injured party are absolute he must perform them, even though the other party has not performed his own. But so far as the obligations of the injured party are by the express words of the contract or by legal implication made conditional on the performance of the obligations of the other, the injured party is entitled to say: “Since you have broken your part of the contract I shall not perform mine, and I rescind the contract accordingly”.

Thus in *Bettini v. Gye* (b) the plaintiff, a singer, agreed with the defendant, the director of the Italian Opera in London, to sing in operas and concerts for a specified period and at a specified salary. One of the terms of the contract was that the plaintiff should “be in London without fail at least six days before March 30, 1875, for the purpose of rehearsals”. The plaintiff did not in fact reach London until March 28, and the defendant therefore refused to accept the plaintiff’s services and purported to rescind the contract. The plaintiff thereupon sued the defendant on the contract, and the defendant having pleaded that he was entitled to rescind it on account of the plaintiff’s breach in not arriving on time, the plaintiff demurred. “The question raised by the demurrer”, said Blackburn, J., delivering the judgment of the Queen’s Bench Division (c), “is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant’s part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant’s liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. . . . We think the answer to this question depends on the true construction of the contract taken as a whole”. The Court then pointed out that the parties might have expressly made the obligation to be in London a condition of the contract; but as they had not done so,

(b) (1876), 1 Q. B. D. 183.

(c) Blackburn, Quain and Archibald, JJ., at p. 187.

the Court had to consider whether this obligation was impliedly such a condition. Having regard to the contract as a whole and the circumstances of the case the Court held that no such implication should be made (*d*).

Although in such cases the contract is said to be voidable by one party because the other has broken his contractual obligation, it is not the breach of obligation *per se* which has this effect, but the breach as constituting the failure of a condition. If the particular matter were simply the subject of a condition and not also of a promise the contract would nevertheless still become void or voidable if the condition failed. Thus in *Poussard v. Spiers* (*e*) the plaintiff was disabled by sickness from attending the earlier performances of an opera in which she had been engaged to play and after she had recovered the defendants refused to accept her services for the remainder of the season during which the opera was being presented. It was held by the Queen's Bench Division that as the plaintiff's non-attendance was due to sickness it did not amount to a breach of contract for which an action might be brought against her. Nevertheless it constituted a failure of a condition, and the defendants were accordingly justified in regarding the contract as at an end (*f*).

Conventional Condition. The condition on which the right of rescission for breach of contract depends is not a legal or external

(*d*) See also *Hochster v. De la Tour* (1853), 2 E. & B. 678, 689; 118 E. R. 922, 926; *Frost v. Knight* (1872), L. R. 7 Ex. 111, 115; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 439; *Bentsen v. Taylor*, [1893] 2 Q. B. 274. In the latter case the question was whether the breach of a warranty in a charterparty that the ship "had sailed or was about to sail to the United Kingdom" entitled the injured party to rescind the contract. Bowen, L.J., in the course of his judgment, remarked (p. 280): "it . . . remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract". See further *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K. B. 315, 321; *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 187.

(*e*) (1876), 1 Q. B. D. 410.

(*f*) This was a case of frustration (see p. 512, *ante*), and in such a case the failure of condition *ipso facto* avoids the contract. It would be manifestly undesirable, however, to allow this result to follow where the failure of condition was also a breach of the contract by one party. A party should not be allowed to escape from the contract by the simple device of breaking it, even at the cost of paying damages. Accordingly, when the failure of condition is also a breach of the contract the contract (unless further performance of it is by the breach itself rendered wholly impossible) is not *ipso facto* void but voidable at the election of the injured party. See p. 559, *post*.

condition imposed *ab extra* by the law itself—like the conditions as to contractual capacity, legality, and absence of misrepresentation. It is, on the contrary, a conventional condition forming one of the internal terms of the contract, and constituted either by the express consent of the parties or by consent constructively attributed to the parties by way of interpretation. The question as to when a contract is avoided by fraud or illegality (initial or supervening) is to be answered by reference to those rules of law which determine *ab extra* the external conditions of contractual validity. But the question as to when a contract is avoided by breach, or, as we have seen in an earlier chapter (g), by frustration, is to be answered by reference to those rules of legal interpretation which determine the conventional terms of the contract.

The conventional condition on which the right of rescission for breach is thus dependent may be either express or implied. In some cases the obligation of the one party is expressly made conditional on performance of the obligation of the other party. In this case the question as to the right of rescission for breach raises no difficulty, other than the difficulty which may in any case be inherent in ascertaining the precise meaning of express terms. More commonly, however, the condition is left to be implied by the law. The parties have been content to set out in express terms the content of the obligations assumed by each, but have failed to answer in express terms the question whether and how far any of such obligations are to be conditional on the performance of any other. It is in these cases that the difficulties commonly arise which beset the question of the right of rescission for breach.

Principles of Interpretation. The question whether an implied condition of this kind is to be read into any contract is determined by exactly the same legal principles of interpretation as are applicable to all other implied conditions. The guiding principle is that of necessary implication (h). Having regard to the terms of the contract, its nature and its purposes, is the breach which has been committed of such importance as to justify the law in attributing to the parties an intention that in the event of such a breach the contract may be rescinded by the injured party? If so, the law will import into the contract an implied condition to this effect. But if not, the injured party will remain bound by his contract not-

(g) Chapter XXI, p. 508, *ante*.

(h) See pp. 39 *et seq.*, *ante*.

withstanding the breach thereof by the other party. The principle was thus expounded by Bowen, L.J., in *Bentsen v. Taylor* (i): "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out . . . not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract". In *Bettini v. Gye* (k), Blackburn, J., delivering the judgment of the Queen's Bench Division, stated the principle in the following terms: "in the absence of . . . an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged (l), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for (m); or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent" (n).

Essential Breach. Any breach which thus justifies rescission in pursuance of an express or implied condition to that effect may be conveniently distinguished as an *essential* breach. It is a breach which relates to the *essence* of the contract—the failure, that is to

(i) [1893] 2 Q. B. 274, 281.

(k) (1876), 1 Q. B. D. 183, 188.

(l) In *Graves v. Legg* (1854), 9 Ex. 710, 716; 156 E. R. 304, 306; 23 L. J. Ex. 228.

(m) Cf. Lord Atkin's statement of the principle of necessary implication in relation to mutual mistake and to frustration in *Bell v. Lever Brothers, Ltd.*, [1932] A. C. 161, 226–7, quoted in part, p. 514, *ante*; see also *Bank Line, Ltd. v. Capel*, [1919] A. C. 435, and see pp. 219, 220, *ante*.

(n) See also *per* Lord Blackburn in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 443–4; *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 187.

say, of a condition of the continued existence and validity thereof. Conversely, a breach of obligation which is not thus at the same time a breach of condition, and therefore does not justify rescission, may be distinguished as an *inessential* or *non-essential* breach (o). This distinction is identical with that already drawn between essential and inessential error (p) and between essential and inessential frustration (q) (r). Similarly, any obligation is an essential obligation and is of the essence of the contract if and so far as a breach thereof is an essential breach and justifies rescission. If and so far as an obligation is not such that its breach justifies rescission, it is inessential and is not of the essence of the contract. This is the meaning, for example, of the statement that in a contract for the sale of land time (the time of performance) is not of the essence of the contract unless it is expressly declared to be so.

Dependent and Independent Obligations. Obligations which by the express or implied terms of the contract are so related to each other that the performance of one of them is a condition of the other are called dependent obligations. Obligations which are not so connected with each other are said to be independent (s).

Rescission Distinguished from Right of Suspension. The right of one party to rescind the contract because of the breach of an essential obligation thereof by the other party must be distinguished from the right of one party to suspend the performance of his own obligation until the other party has performed an obligation which lies upon him. The distinction is that which exists between the effect of a condition broken and that of a condition pending. When a condition is broken the obligation which depends upon it is invalidated; but when the condition is merely pending the obligation which depends upon it is merely suspended. This distinction applies to obligations that are conditional on the performance of other obligations, no less than to obligations dependent on any other condition. While an obligation is still unperformed but not yet broken, any corresponding obligation which is conditional upon it is suspended and not yet enforceable. The one party can say to the other: "Since you have not yet performed your obligation I am

(o) Cf. *Bettini v. Gye* (1876), 1 Q. B. D. 183, 187, 188; *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14, per Lush, J.

(p) See p. 219, *ante*.

(q) See p. 515, *ante*.

(r) See also n. (f), p. 536, *ante*.

(s) *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 187.

not yet bound to perform mine ”. But when an essential obligation has been actually broken, the corresponding obligation which is dependent upon it is not merely suspended but invalidated. The one party can say to the other: “ Since you have broken your obligation I shall refuse to perform mine at all, and I rescind the contract ”. Thus if the seller sends goods not in conformity with the contract the buyer is entitled to refuse to accept them or to pay the price. The condition precedent of the delivery of proper goods (t) is unperformed, and the buyer, therefore, not bound to perform his own obligation to accept and pay. But the buyer is not necessarily entitled not merely to refuse to accept and pay for the goods so offered, but also to rescind the contract and refuse to accept and pay for any goods at all. The condition may still be pending. There may still be time for the seller in accordance with the contract to make a further and substituted tender of the proper goods, and, if so, the seller will be bound to accept and pay for them (u). But if it is too late to make any substituted tender there has been an essential breach of the contract, entitling the seller not merely to suspend his obligation of acceptance and payment, but to rescind it. He can plead the actual failure of a condition precedent, and not merely the pendency of such a condition.

Right of Rescission a Question of Law. Whether a breach of contract which is not also a breach of an express condition is essential or unessential—whether it confers a right of rescission or whether it does not—is a question of law and not of fact. It is a question for the Court and not for the jury. Rescission in such a case depends on a condition implied by law, not on a condition implied in fact. The implied intention of the parties in which this condition has its source is a constructive intention attributed to the parties by the law, and not an actual though verbally unexpressed intention attributed to them by an inference of fact. The question is not what the parties intended, but what the law presumes that they intended. And this is so whether the contract into which the implied term is to be read by the law is a contract in writing or one made by word of mouth. But although this is so the facts from which the legal inference is drawn must first be found by the jury. It is for the jury to find as a fact the nature, circumstances, and con-

(t) See p. 558, *post*.

(u) *Borrowman v. Free* (1878), 4 Q. B. D. 500; *Wallis, Son & Wells v. Pratt & Haynes*, [1910] 2 K. B. 1003, 1018 (the actual decision reversed, [1911] A. C. 394); *E. E. & Brian Smith (1928), Ltd. v. Wheatsheaf Mills, Ltd.*, [1939] 2 K. B. 302, 314–5; *Hindley & Co. v. General Fibre Co.*, [1940] 2 K. B. 517.

sequences of the breach, and the effect of it upon the purposes of the contract and the interests of the parties. But where the necessary foundation of the legal inference has thus been laid by findings of fact it is for the Court as a matter of law, and not for the jury as a matter of fact, to determine whether the facts as so established are sufficient to justify the importation into the contract of an implied condition conferring a right of rescission (x).

§ 191. Essential Breach may be Actual or Anticipatory

An essential breach of contract—a breach giving rise to the right of rescission—is of two distinct kinds. It is either (1) an actual and present breach, or (2) a constructive and anticipatory breach (y). An actual breach of contract cannot take place until the time for performance has arrived (z). But in certain cases acts done by a party before performance has become due are treated by the law as amounting to a constructive breach by way of anticipation, and give rise accordingly to a right of rescission and damages as in the case of an actual breach. This happens in two classes of cases—namely, (1) the repudiation of the contract, and (2) impossibility of performance brought about by the act of the party (a).

(1) *Repudiation of the Contract.* By repudiation is meant the act of one party to the contract in expressing and communicating to the other party before the due date of performance his intention not to perform the contract when that date arrives. In such a case the other party is not bound to wait in order to see whether, after all, the contract will not be duly performed when the time arrives. He is entitled, on the contrary, to take the repudiating party at his word and to rescind the contract on the ground of anticipatory breach of it (b).

A party, however, is not bound thus to take advantage of repudiation. He can, on the contrary, elect to disregard it and keep the contract on foot until the due time for performance has arrived (c). Then, if an actual and essential breach of the contract

(x) *Bentsen v. Taylor, Sons & Co.*, [1893] 2 Q. B. 274, 278, 280-1; *George D. Emery Co. v. Wells*, [1906] A. C. 515; *Re Rubel Bronze & Metal Co and Vos*, [1918] 1 K. B. 315, 322-3.

(y) *Frost v. Knight* (1872), L. R. 7 Ex. 111, 112-3; *Johnstone v. Milling* (1886), 16 Q. B. D. 460, 466-7, 472-3; *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434, 442-3.

(z) *Frost v. Knight*, *ubi supra*.

(a) *Ib.* 112.

(b) *Hochster v. De la Tour* (1853), 2 E. & B. 678; 118 E. R. 922.

(c) *Martin v. Stout*, [1925] A. C. 359, 368-5.

takes place, he will have the same right of rescission and of damages as if no such anticipatory repudiation had taken place at all. But if he fails to take advantage of repudiation by rescinding then the contract remains on foot for all purposes up to the due date of performance, with all normal incidents attached to it. If, therefore, in the interval some event happens which entitles the repudiating party himself to rescind the contract or to claim that it has become dissolved, the repudiating party is entitled to this benefit, notwithstanding his prior act of unaccepted repudiation (*d*). If, for example, in a contract for future personal service the party by whom the service is due repudiates the contract, the other party can forthwith accept the repudiation by rescinding the contract. But if he does not so rescind, but keeps the contract on foot, the repudiating party may die before the date of performance arrives, and the contract is then dissolved by supervening frustration, so that the other party loses the rights which, on the ground of anticipatory repudiation and constructive breach, he might have exercised, but did not choose to exercise.

In order that repudiation shall thus amount to a constructive breach of the contract giving rise to an immediate right of rescission and damages, the repudiation must relate either to the entire contract, or, at least, to some essential obligation thereof. The only constructive and anticipatory breach that produces this result is one which, if it was actual and not merely constructive, would confer a right of rescission. To repudiate an unessential obligation does not confer a right of rescission, any more than the actual present breach of the same unessential obligation would do so. A breach which I may actually commit without thereby rendering the contract voidable may *a fortiori* be threatened by way of anticipatory breach without any such result (*e*). In a contract for the sale of land time is not of the essence of the contract. An anticipatory refusal to perform the contract on the due date, therefore, is no more a ground of rescission as for a constructive breach than is an actual failure to complete the contract on the due date.

The right of rescission for repudiation extends even to cases in which the obligation so repudiated is subject to some condition which may possibly fail before the due date of performance. The repudiation of a conditional obligation is no less a ground of immediate

(*d*) *Avery v. Bowden* (1855), 5 E. & B. 714; 119 E. R. 647; affirmed, 6 E. & B. 953; 119 E. R. 119; *Frost v. Knight* (1872), L. R. 7 Ex. 111, 112.

(*e*) *Johnstone v. Milling* (1886), 16 Q. B. D. 460, 468, 471; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813.

rescission and damages than the repudiation of an absolute obligation. It is no defence to the repudiating party that peradventure he would never have had to perform the repudiated obligation at all. This consideration is relevant only to the measure of damages recoverable for the repudiation (*f*).

(2) **Impossibility Created by the Other Party.** As already indicated, the constructive or anticipatory breach of a contract takes place in two different ways. The first of them—namely, repudiation—has been sufficiently considered. The second consists of the act of the party in making it impossible for him to perform his contract when the due date of performance arrives. In such a case, as in that of express repudiation, the other party is not bound to wait until the due date. He is entitled forthwith to say to the defaulting party: “You have by your own act precluded yourself from performing your contract when the time arrives. I shall now, therefore, treat it as already broken, and I shall rescind it accordingly and sue you for damages for the loss of it”. Thus if the seller has agreed to sell and deliver a specific chattel to the buyer on a future day, but sells and delivers the same chattel to another purchaser before that day, the first buyer is not bound to wait until the due date and then rescind the contract and sue for damages. He is entitled, at his election, to do so at once, just as in the case of anticipatory breach by repudiation. Thus in *Synge v. Synge* (*g*), on the negotiation for a marriage the man contracted with his intended wife to make provision for her by giving her a life interest in certain real property. After the marriage he transferred the property to another person. Although this was not an actual breach of his contract, inasmuch as he had his whole lifetime in which to perform it, it was held that his wife had an immediate right to treat the contract as rescinded and to sue for damages as for a constructive anticipatory breach of it (*h*).

The same considerations which have been already referred to as applicable to repudiation apply equally to this second form of constructive breach.

§ 192. Principle of Essential Breach Further Considered

We have already said that an essential breach of contract conferring a right of rescission on the other party, is a breach which

(*f*) Cf. *Frost v. Knight* (1872), L. R. 7 Ex. 111, 113.

(*g*) [1894] 1 Q. B. 466.

(*h*) See also *Hochster v. De la Tour* (1853), 6 E. & B. 678, 688; 118 E. R. 922, 926; *Frost v. Knight* (1872), L. R. 7 Ex. 111, 112.

amounts not merely to the breach of an obligation, but also to the breach of an express or implied condition of the contract. We have also said that an implied condition to this effect is read into the contract by the law whenever the breach is of such a nature, with reference to its importance and its effects upon the fulfilment of the purposes of the contract and upon the interests of the parties, that the law is constrained to attribute to the parties the constructive intention that the contract shall be subject to rescission by the injured party in the event of such a breach occurring. Before proceeding to develop and illustrate this general principle it is advisable to consider and dispose of a different principle which the law might have, but has not, recognised. A system of law is conceivable in which the right of rescission for breach is dependent exclusively on the relative order in time of the respective obligations of the two parties in respect of the due dates of performance. An obligation which is earlier in its due date than the corresponding obligation of the other party may be conveniently distinguished as a *prior* obligation. One which is later in its due date than the corresponding obligation of the other party may be termed a *subsequent* obligation. When the obligations of both parties have the same due date they may be termed *concurrent* obligations, neither obligation being either prior or subsequent to the other. When goods are sold on credit, the obligation of the seller to deliver them is a prior obligation, and that of the buyer to pay for them is a subsequent obligation. When goods are to be paid for tomorrow and delivered next week, the opposite relation exists between the respective obligations of the two parties. But in the case of the sale of goods for cash the obligations of buyer and seller are concurrent. The goods are to be delivered and paid for at one and the same time.

Now, the law, in regard to rescission for breach, might have adopted the simple and rigid rules that every prior obligation is a condition of the performance of every subsequent obligation; that no subsequent obligation is a condition of the performance of any prior obligation; and that all concurrent obligations are also concurrent conditions, the performance of each being conditional on the simultaneous performance of the other. Such rules would have been perfectly definite and intelligible, but they would not have been in conformity with justice or reason, and they do not in fact amount to an authentic expression of the modern law on this subject (i).

(i) *Simpson v. Grippin* (1872), L. R. 8 Q. B. 14, per Blackburn, J., 17.

The most that can be said is that the relative order of obligations in point of time is one, but only one, of the relevant considerations to be taken into account when the law seeks to import into a contract, in accordance with the presumed or constructive intention of the parties, an implied condition that the performance of one obligation is to be a condition of the other. But this consideration is far from conclusive. Concurrent obligations are not necessarily concurrent conditions: they may be independent in operation, although coincident in date. So a prior obligation is not necessarily a condition of the subsequent obligation of the other party. If a builder contracts to build a house, to be paid for by a lump sum a month after completion, he may fail in many respects to fulfil this prior obligation without thereby entitling the building owner to rescind the contract and refuse to pay for the house. For the defects in the building may not amount to an essential breach of the contract, and may therefore entitle the building owner to damages for breach of contract only, and not to rescission (*k*). Conversely, it is not even true that a subsequent obligation can in no case be a condition of a prior obligation. For it may become such by an anticipatory breach of that subsequent obligation by way of repudiation or otherwise so as to entitle the other party to rescind his own prior obligation because of the threatened non-performance of obligations subsequent to his own (*l*).

Various Expressions of the Principle. The authorities exhibit a curious discordance in the language used from time to time to express the general principle on which the right of rescission for breach is founded. We find it said variously that in order to justify rescission the breach must be vital (*m*) to the contract, or must go to the root of the contract (*n*), or must relate to the substance of the contract (*o*), or must cause a total failure of consideration (*p*), or must amount to a repudiation of the entire contract (*q*). Some of the

(*k*) *H. Dakin & Co., Ltd. v. Lee*, [1916] 1 K. B. 566; see also *Ellen v. Topp* (1851), 6 Ex. 424, 442; 155 E. R. 608, 616; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813; *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118, 121.

(*l*) *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543.

(*m*) *Wallis v. Pratt*, [1910] 2 K. B., per Fletcher Moulton, L.J., 1012.

(*n*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 443.

(*o*) *Wallis v. Pratt*, *ubi supra*.

(*p*) Cf. Rr. 3 and 4 in notes to *Pordage v. Cole* (1607), 1 Wms. Saund. (6th ed.), 319, 320; 85 E. R. 449, 452; and *Davidson v. Gwynne* (1810), 12 East 381, 389; 104 E. R. 149, 152.

(*q*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, *supra*, pp 438-9.

expressions so used in this connection are merely metaphorical and therefore unsatisfactory. Others are not in strict conformity with the general principle, though they may be well enough as applied to the facts of the particular case in respect of which they were used. The statement that an essential breach is one which is vital to the contract or goes to the root or substance of the contract is merely another method of indicating the general principle, already formulated, that the breach must be so important that it would be unreasonable to suppose that the parties intended one of them to remain bound by his own obligations when the other had so disregarded the correlative obligations which lay upon him. The statement, on the other hand, that the breach in order to be essential must amount to a total failure of consideration is, if taken literally, not correct. It is possible for the party in default to have given to the other party a substantial portion of the consideration for his promise and yet release him from that promise by a subsequent essential breach of the contract. A builder who contracts in consideration of a lump sum to build a house on A's land, and after building half of the house abandons his contract and refuses to complete the house, can recover nothing from A either on the contract itself or on a *quantum meruit* for the value of the work which has been done and of which he has received the benefit (r). The statement that an essential breach must amount to a total failure of consideration may, however, be understood to mean, not that nothing at all should have been done by the defaulting party in performance of the contract, but that what has been done should, by reason of either nonfeasance or misfeasance, be "a thing different in substance from what the injured party has stipulated for" (s). Read in this sense the statement correctly indicates the general principle as to essential breach. Nevertheless, although there is no general rule that a party to a contract who has received some part of the consideration from the other is *ipso facto* debarred from rescinding the contract for breach, the fact of such part performance may in at least two cases preclude rescission. First, the part performance may have gone so far that failure to perform what remains to be done could not in any event amount to an essential breach (t).

(r) *Sumpter v. Hedges*, [1898] 1 Q. B. 673; cf. *H. Dakin & Co., Ltd. v. Lee*, [1916] 1 K. B. 566. See also *Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D. 648, 657-8, 670; 9 App. Cas. 434, 446.

(s) *Bettini v. Gye* (1876), 1 Q. B. D. 183, 188; *Chanter v. Leese* (1839), 5 M. & W. 698, 701-2; 151 E. R. 296.

(t) See cases cited p. 545, n. (k), *ante*. This principle cannot apply if complete and exact performance is expressly made a condition of the contract. *Sinclair v. Bowles* (1829), 9 B. & C. 92; 109 E. R. 35.

Secondly, the part performance may have been accepted by the other party in such circumstances as to constitute a waiver on his part of any right to rescind the contract for breach (u). This will happen, e.g., if that which is accepted is itself the breach of contract and is accepted with the knowledge that it is so (x), or if, not being itself the breach of contract, it is accepted with the knowledge that the party tendering it has already committed the breach of contract (y). The acceptance of the proffered performance will in cases such as these amount to an election not to rescind the contract for that breach (y). Such an acceptance will not, of course, debar the injured party from rescinding if subsequently a further essential breach is committed (z).

(u) See Smith's Leading Cases (13th ed.), vol. 2, 13-14.

(z) *Per* Channell, J., in *Hoare v. Rennie* (1859), 5 H. & N. 19, 29; 157 E. R. 1083, 1088. See also Wallis, *Son d Wells v Pratt and Haynes*, [1910] 2 K. B. 1003, 1113; ss. 11 (1) (c), 34 and 35, Sale of Goods Act, 1893; and p. 51, *ante*.

(y) *Graves v. Legg* (1854), 9 Ex. 709, 717-8; 156 E. R. 304, 307, *Hanley v. Pease and Partners, Ltd.*, [1915] 1 K. B. 698, 705.

With respect to the sale of goods s. 11 (1) (c) of the Sale of Goods Act, 1893, provides as follows: "... where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect". The exact effect of this provision is somewhat obscure, but whether it lays down a rule of law contrary to the statements in the text may be doubted. The question was considered by Sir John Salmond in *Taylor v. Combined Buyers, Ltd.*, [1924] N. Z. L. R. 627, and he stated his conclusion as follows (p. 649) · "I conclude, therefore, that on the sale of a specific article the buyer is entitled to reject the article for any breach of the implied condition of conformity with the description, fitness for the purpose, or merchantable quality (see ss. 13 and 14), notwithstanding the circumstance that but for the breach of that condition the property in the article would have already passed to the buyer. If this is so, the reference in s. 13 [s. 11 of the English Act] to the passing of the property as excluding the right of rejection must be read as limited to cases in which the property has passed to the buyer notwithstanding the breach of condition, in consequence of waiver, or acceptance, or otherwise *ex post facto*". See also Benjamin on Sale (7th ed.), p. 589.

(z) The case of *Hunt v. Silk* (1801), 5 East 449; 102 E. R. 1142, is sometimes cited as an authority for the proposition that one who has accepted anything under the contract from the other party may not thereafter rescind the contract even though that other party should subsequently commit a breach which would otherwise be essential. In *Hunt v. Silk* A agreed in consideration of £10 to be paid by B to let B a house. A was to repair the house within ten days, but B was to have immediate possession. B entered into possession accordingly, and although the repairs were not done within the ten days, continued in possession for some days longer. He then purported to rescind the contract and go out of possession, and sought to recover the £10 which he had paid. This claim was treated by the Court of King's Bench as turning on whether B was entitled so to rescind; and the Court decided that he was not so entitled. Now it is to be observed that there were two distinct periods of possession which B had accepted of A, viz., the ten days before A's breach, and the days thereafter. Had the Court founded its decision on B's possession for the first ten days, or for the whole period without distinguishing between its component parts, the case would undoubtedly have been authority for the proposition in question. That, however, was not what the

Breach Operating as Evidence of Anticipatory Breach. The proposition that an essential breach must be one which amounts to a repudiation of the entire contract is not capable of support as a general principle (a). It indicates, however, an important consideration which has often to be taken into account in questions of rescission. A breach of contract may be in itself unessential as relating to a subsidiary obligation not *per se* of the essence of the contract. Nevertheless, it may be committed in such circumstances as to be sufficient evidence of a repudiation and anticipatory breach of the entire contract, or, at all events, of some other part of the contract which is itself essential. In such a case the actual and unessential breach is accompanied by a constructive, anticipatory, and essential breach which is sufficient to justify rescission. The actual breach operates not *per se* but as evidence of facts constituting an anticipatory breach which is essential. In such cases, therefore, and in this sense, it is correct to say that the actual partial breach is not enough to justify rescission unless it amounts to a repudiation of the contract (b). It is not correct, however, to say that no actual partial breach is *per se* sufficient for rescission. It is sufficient if, though merely partial, it pertains to the essence of the contract. In such cases it operates *per se*, and requires no help from

Court seized upon, but B's continuing in possession after the ten days with knowledge of A's breach of contract. Admittedly all the Judges referred to the impossibility of restoring the *status quo* once the party purporting to rescind had accepted partial performance from the other party, but if this had been decisive B's possession for the ten days would have been just as fatal as his possession thereafter. Assuming that A's breach was essential, the only ground upon which possession after its occurrence could have defeated B's right to rescind which would not equally have been a ground upon which prior possession would have had a like consequence was B's waiver of his right. It is submitted, therefore, that *Hunt v. Silk*, so far as it deals with the right to rescind for breach, is merely an example of the waiver of such a right by acts of the injured party done subsequently to his learning of the breach. Cf. Morison, *Rescission of Contracts* (1916), 180, and see *Spence v. Crawford*, [1939] 3 A. E. R. 271, 290.

It is to be observed that in cases such as *Hunt v. Silk* two distinct questions arise: first, whether the plaintiff is entitled to rescind; secondly, if he is so entitled, whether he can recover in an action for money had and received what he has paid to the defaulting party. *Vide ante*, p. 563. It is in regard to the latter question that the possibility of restoring the *status quo* is important, for the action for money had and received may be maintained only where there has been a total failure of consideration; and the common law principle was that if the plaintiff had received from the defendant performance with which the common law machinery for effecting *restitutio in integrum* was incapable of dealing (v. p. 265, *ante*), no such total failure of consideration occurred. *Blackburn v. Smith* (1848), 2 Ex. 783, 792; 154 E. R. 707, 711. See also *Spence v. Crawford*, *ubi supra*.

(a) Cf. Lord Wright, 55 L. Q. R. 208-9, reprinted in *Legal Essays and Addresses*, 232-3.

(b) *Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D. 648, 670; *Millar's Karri and Jarrah Co. v. Weddel, Turner & Co.* (1908), 100 L. T. 128.

any repudiation and anticipatory breach of which it may be the evidence. A trifling breach of duty by a servant may not in itself be sufficient to justify his dismissal, but it may be sufficient if of such a nature and committed in such circumstances as to prove an intention on the servant's part to repudiate his entire obligations or an essential portion thereof. His breach of duty, however, though partial only, and though not such as to indicate any further purpose of repudiation, may be *per se* essential so as to justify his dismissal without recourse to any presumption of total repudiation (c). In determining whether a non-essential actual breach constitutes evidence of a repudiation of the contract or an essential part thereof it is relevant to consider the extent to which the defaulting party advanced in his performance before committing the actual breach; for "the further the parties have proceeded in the performance of the contract the less likely is it that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract, or his intention not to carry it out" (d).

Proof of Intention to Repudiate. The question of whether in any particular case a party has repudiated the contract or an essential part thereof is to be determined in accordance with the ordinary principles which apply whenever the ascertainment of a person's intention becomes relevant. The inquiry is an objective and not a subjective one (e). There will be attributed to the allegedly repudiating party such an intention in the matter as a reasonable person in the position of the other party would have supposed the former party to be manifesting, unless that other party actually knew that despite appearances the former party had no such intention (f).

§ 193. Instalment Contracts

The foregoing propositions may be tested by reference to a series of decisions on contracts involving performance in instalments. Most, though not all, of the cases concern contracts for the sale and delivery of goods in instalments; and commonly each instalment is to be paid for separately as or shortly after being delivered.

(c) *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K. B. 315, especially at 321-2; see also *Maple Flock Co v Universal Furniture Products (Wembley), Ltd*, [1934] 1 K. B. 148.

(d) *Cornwall v. Henson*, [1900] 2 Ch. 298, 304.

(e) Cf. pp 3, 4, *ante*.

(f) *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Maple Flock Co. v. Universal Furniture Products*, [1934] 1 K. B. 148.

A preliminary question which may arise in cases involving performance by instalments is whether the parties have entered into one contract or a series of contracts. In the latter case, of course, breach of one of the contracts will not (in the absence of an express condition as to the matter) affect the others. It is only where the parties' arrangement, on its true construction, is a single contract to be performed in instalments that the question can arise of whether failure in the performance of an instalment amounts to such a breach of an implied condition of the continued validity of the contract as a whole as to entitle the injured party to rescind.

Prima facie where parties have arranged for the sale and purchase of goods in instalments the transaction will constitute a single contract and not a series of contracts (g).

It is with single contracts providing for instalment performance that we are here concerned. We shall consider the cases under the two heads of actual and anticipatory breach.

Rescission of Instalment Contracts for Actual Breach.

Cases of actual breach in the performance of instalment contracts are either cases of failure to pay an instalment of money, or failure in respect of some other kind of performance, as delivery or acceptance of an instalment of goods.

Failure to pay instalment of money. Failure to pay an instalment of money is not, *prima facie*, an essential breach justifying the rescission of the contract (h).

Failure in respect of an instalment of some other kind of performance. It now appears to be settled that such cases are to be dealt with in accordance with the general principles as to essential breach which we have already stated. The authorities are not without their difficulties, however, and the position may best be exhibited by examining the principal decisions *seriatim*.

The first decision to which reference need be made is *Hoare v. Rennie* (i). The plaintiffs agreed to sell to the defendants 667 tons of iron to be shipped in June, July, August and September, in about equal portions each month, payment to be made on arrival. The plaintiffs were to have the option of commencing shipments in May

(g) *Honck v. Muller* (1881), 7 Q. B. D. 89, 100; *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, 439; *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148, 154.

(h) *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, 439, 444. Cf. Sale of Goods Act, 1893, s. 10 (1); also s. 31 (2), quoted pp. 550, 556, *post*.

(i) (1859), 5 H. & N. 19; 157 E. R. 1083.

and of completing the whole by the end of July. The plaintiffs did not commence shipping the iron in May and in June shipped only twenty-one tons. The defendants declined to accept the twenty-one tons and refused to proceed further with the contract, whereupon the plaintiffs sued for non-acceptance of the goods (first count) and wrongful repudiation of the contract as a whole (second count). The defendants having pleaded to each count that the plaintiffs' default in the June delivery entitled the defendants to rescind the contract the plaintiffs demurred, but the Court of Exchequer upheld the pleas. Pollock, C.B., said (*k*): "The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement. . . . The case was put of the plaintiffs sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in *statu quo*. Probably, therefore, in such a case, the defendants could not have repudiated the contract and must have been left to their cross-action. - Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract. Where parties have made an agreement for themselves, the Courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants have a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for". Watson and Channell, BB., were of the same opinion. The decision in this case is intelligible enough, but the reasons given for it were the cause of much subsequent difficulty. - It will be observed that the Court did not in terms address itself to the question of whether the pleaded breach was essential, but appeared to consider that the matter turned on the fact of the breach having occurred in relation to the first instalment.

Hoare v. Rennie was soon the subject of adverse criticism. In

(*k*) 5 H. & N 27; 157 E. R 1087.

Jonassohn v. Young (l) the contract was for the sale and purchase of as much coal of a particular quality as a ship plying between S. and L. could carry in nine months, the purchaser to provide the ship. After a certain amount of coal had been shipped the purchaser refused to accept any more and the vendor thereupon sued in respect of this refusal. The purchaser pleaded that he was entitled to rescind because the vendor had delivered coal of a quality inferior to that specified, and further, "on divers occasions" when the purchaser sent his ship to load the coal the vendor detained her an unreasonable time. The Court overruled both pleas on the ground that they did not allege an essential breach. Crompton, J., said (m): "The vice of both pleas is the same, that the breach goes only to part of the consideration. The argument for the defendants must go this length, that the supply of one chaldron of coal of an inferior quality, or the unnecessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract". In the course of the argument *Hoare v. Rennie* was cited, and Crompton and Blackburn, JJ., both appeared to regard that case as a doubtful authority. Blackburn, J., seemed to consider that the reasoning of the Judges in *Hoare v. Rennie* could be supported only if the contract had related solely to the first instalment. "The reasoning of the Judges in that case", he said, "does not apply to the plea pleaded to the second count. As reported, it looks as if the Court forgot the second count." Crompton, J., considered that the decision in *Hoare v. Rennie* could be accepted only if the breach there alleged could be regarded as essential. "In *Hoare v. Rennie*", he said, "we must take it that time was of the essence of the contract." And later: "We must consider that the breaches alleged in the pleas in that case went to the root of the matter".

The next case is *Bradford v. Williams* (n), an action on a charterparty providing for a series of voyages during a fixed term. The ship was to load with G. or H. at the captain's option until the end of September and thereafter with H. In September, by which time the ship had made a number of voyages under the charterparty, the captain exercised his option in favour of loading with G., but the plaintiffs refused to load him from G., whereupon the defendant declined further to perform the charterparty. The Court of

(l) (1863), 4 B. & S. 296; 122 E. R. 470; 32 L. J. Q. B. 385. Best & Smith erroneously say that judgment was for the defendant. The Law Journal correctly reports that it was for the plaintiffs.

(m) B. & S. 300; E. R. 472.

(n) (1872), L. R. 7 Ex. 259.

Exchequer decided in favour of the defendant. Martin, B., citing in support *Hoare v. Rennie*, considered that the question was what was the substance of the contract; and held that the plaintiff had refused to perform a material part of the bargain and that no cross-action for damages would have fully compensated the defendant. In other words, Martin, B., founded his judgment upon the ordinary principles as to essential breach; and it is significant, therefore, that he should have regarded *Hoare v. Rennie* as supporting that judgment. Bramwell and Pigott, BB., likewise delivered judgments in conformity with the general principle.

Hoare v. Rennie was next considered in *Simpson v. Crippin* (o), in the Queen's Bench. There the defendants agreed to supply the plaintiffs with from 6,000 to 8,000 tons of coal in equal monthly quantities during a period of twelve months. The plaintiffs were to send waggons for the coal. During the first month the plaintiffs took only 158 tons and the defendants therefore claimed to rescind the contract. The Court decided against them. All three Judges (Blackburn, Mellor and Lush, JJ.) clearly considered the case indistinguishable from *Hoare v. Rennie*, but the majority refused to follow that decision. Blackburn, J., said it was difficult to understand upon what principle *Hoare v. Rennie* was decided. Lush, J., said: "I cannot understand the judgments in *Hoare v. Rennie*. The Court must have interpreted the contract in that case as if time were of its essence. . . ." Mellor, J., dissenting, considered that the Court should have held itself bound by *Hoare v. Rennie*.

Some years after *Simpson v. Crippin* was decided similar facts came before the Court of Appeal in *Honck v. Muller* (p). The defendant had agreed to sell and the plaintiff to buy 2,000 tons of iron to be delivered in November, or at 6d. per ton extra equally over November, December and January. The plaintiff failed to take any iron in November, but claimed to be entitled to one-third in December and one-third in January. Bramwell and Baggallay, L.JJ., decided that the defendant was entitled to rescind and approved of *Hoare v. Rennie*. Brett, L.J., dissented, and expressed the opinion that *Hoare v. Rennie* was wrongly decided. Bramwell, L.J., in the course of his judgment said (q): "I think where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by

(o) (1872), L. R. 8 Q. B. 14.

(p) (1881), 7 Q. B. D. 89

(q) Pp. 98, 99.

him. . . . If, indeed, the contract has been performed and cannot be undone, then it must be proceeded with without such power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery". The learned Lord Justice then attempted to reconcile *Hoare v. Rennie* and *Simpson v. Crippin*. He considered both cases rightly decided; and distinguished *Simpson v. Crippin* on the ground that there the contract had been partly performed and could not therefore be undone. Baggallay, L.J., however, considered that the two cases were in conflict and preferred *Hoare v. Rennie*. Brett, L.J., dissenting, vigorously attacked the view that failure to perform a first instalment should in all cases entitle the injured party to rescind while failure to perform a second or subsequent instalment should in no case have this effect.

At this stage the effect of the authorities appeared to be that *Jonassohn v. Young*, *Bradford v. Williams*, and *Simpson v. Crippin* were consistent with each other and the general principle of rescission for essential breach. *Hoare v. Rennie* and *Honck v. Muller*, on the other hand, seemed to establish, inconsistently with the general principle, (1) that with respect to the performance of the first instalment the parties were entitled to insist on exact compliance with the contract and to rescind for any default; but (2) that no rescission could be had if the contract had already been partly performed by the defaulting party. *Hoare v. Rennie* had on several occasions been adversely criticised in Courts of co-ordinate jurisdiction; but for the time being its authority had become pre-eminent by reason of its adoption by the Court of Appeal in *Honck v. Muller*.

In this position of the authorities the case of *Mersey Steel and Iron Co. v. Naylor* (r) came before the Court of Appeal and the House of Lords and the difficulties presented by the earlier cases were considered by members of both tribunals. In the Court of Appeal both Jessel, M.R., and Bowen, L.J. (s), dissented from the view that rescission for breach could not be had in cases where the contract had been part performed; and both seemed to think that *Hoare v. Rennie* called for explanation. In the House of Lords Lord Blackburn (t), after restating the general principles as to essential breach, disposed of *Hoare v. Rennie* and *Honck v. Muller* by regarding them as turning on the interpretation which the Courts

(r) (1882), 9 Q. B. D. 648; (1884), 9 App. Cas. 434.

(s) 9 Q. B. D. 657-8, 670-1.

(t) 9 App. Cas. 444-5.

in those cases rightly or wrongly placed on the particular contracts before them. Lord Bramwell also referred to these two cases. He said (u): "I do not think that I said in *Honck v. Muller* what Sir George Jessel supposed me to have said, namely, that 'in no case where the contract has been part performed could one party rely on the refusal of the other to go on'. If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case. What I was busy upon in that case was in showing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. . . . *Hoare v. Rennie* . . . in my opinion, was decided upon the considerations which I have mentioned and which I think should be supported".

The result appears to be that *Hoare v. Rennie* and *Honck v. Muller*, in so far as they fail to accord with the general principles as to rescission for actual and essential breach, cannot be considered authoritative (x). They have been repeatedly criticised and dissented from by eminent Judges; and Lord Bramwell's statement in *Mersey Steel and Iron Co. v. Naylor* seems to be an admission that these cases must be supported, if at all, by reference to the general principle. If they were cases in which to have denied the injured party the right to rescind would have been to compel him (in Lord Bramwell's words) to "accept the performance of something entirely different from what had been agreed upon" (y), then clearly in each case an essential breach giving rise to a right to rescind had been committed.

Rescission of Instalment Contracts for Anticipatory Breach.

An instalment contract may become voidable for anticipatory breach no less than for actual breach. In *Withers v. Reynolds* (z), R. agreed to supply W. for a stated period with straw at the rate of three loads a fortnight. Each load was to be paid for on delivery. Performance of the contract proceeded for a time, and then W.

(u) At p. 446.

(x) See, *contra*, *Norrington v. Wright* (1885), 115 U. S. 189, where the Supreme Court of the United States followed these cases. Some of the reasons given by the Court for its decision do not seem altogether satisfactory. See Benjamin on Sale (6th ed.), 834; (7th ed.), 763.

(y) Cf. *per* Blackburn, J., delivering the judgment of the Queen's Bench Division, in *Bettini v. Gye* (1876), 1 Q. B. D. 183, 188 (quoted p. 539, *ante*); *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 187-8.

(z) (1831), 2 B. & Ad. 882; 109 E. R. 1370.

refused to pay for the last load delivered and announced that thenceforth he would stay one payment in arrears. It was held that R. might rescind the contract. "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract" (a).

Sometimes an actual but in itself non-essential breach in respect of a particular instalment may, when considered in the light of the circumstances of the particular case, be a sufficient ground for inferring an essential repudiation (b). In such cases "the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract" (c). In the case of contracts for the sale of goods the law on this matter has now been declared by the Sale of Goods Act, 1893, in the following terms (d): "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated" (e).

§ 194. Subsidiary Rules as to What Breach Essential in Particular Cases

We have said that rescission by breach is (save in cases where there is an express condition as to the matter) based on an implied

(a) *Patteson, J.*, p. 885; *E. R.* 1371. Cf. *Payzu, Ltd. v. Saunders*, [1919] K. B. 581.

(b) *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, 438-440.

(c) *Freeth v. Burr* (1874), L. R. 9 C. P. 208, *per* Lord Coleridge, C.J., 213. In Lord Coleridge's view, *Hoare v. Rennie* (1859), 5 H. & N. 19; 157 E. R. 1083, was an instance of this principle. If this explanation of *Hoare v. Rennie* were valid, the importance attached by Pollock, C.B., to the default being in the first instalment might be admitted and explained on the ground that default at the outset would be more indicative of an intention to repudiate than similar default after the contract had been partly performed. See p. 549, *ante*.

(d) S. 31 (2).

(e) As to this provision see *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312, and *Maple Flock Co. v. Universal Furniture Products*, [1934] 1 K. B. 148.

condition derived from considerations of the importance of the obligation broken with respect to the purposes of the contract and the interests of the parties, the legal implication being that the parties must have intended the contract to be voidable for such a breach of that obligation. If in the circumstances rescission is a remedy so clearly called for by reason and justice that one must necessarily assume that the parties would have expressly provided for it had the case been present to their minds when they made the contract, the law will attribute to the parties a constructive intention to that effect, and this intention will operate by way of implied condition read into the contract. It is obvious that this principle is essentially vague and difficult of application. It is not surprising, therefore, that the law has endeavoured—as in all other cases in which the same general principle is applied in the ascertainment of implied conditions (f)—to derive therefrom, wherever possible, specific rules capable of easier and more definite application to special classes of cases. We find, accordingly, that the law recognises, in addition to the general principle, certain subsidiary rules which determine in special cases what kinds of breaches are or are not—*prima facie* at least—sufficiently essential to justify rescission.

Thus it is an established subsidiary rule, derived from the general principle, that in contracts for the sale of land the time of completion is not in general of the essence of the contract unless expressly made so by the contract. That is to say, although the contract provides that it is to be completed by conveyance on a certain day, the due observance of this day is generally not a condition of the contract, and neither party can rescind the contract because of failure on the part of the other to complete on this day. Unavoidable delays are so likely to occur in the performance of such contracts, and completion on the due day is commonly so little material to the interests of the parties that in general the law refuses to read into such contracts an implied right of rescission because of failure to complete on the specified date (g).

In contracts for the sale of goods the Sale of Goods Act, 1893 (h),

(f) Cf. pp. 37 *et seq.*, *ante*.

(g) *Stickney v. Keeble*, [1915] A. C. 386; *Steedman v. Drunkle*, [1916] 1 A. C. 275. This rule was originally the rule applied by equity in suits for specific performance. At law the position was otherwise. The equity rule was preferred by s. 25 (7) of the Judicature Act, 1873, now represented by s. 41 of the Law of Property Act, 1925. It would seem that notwithstanding these enactments the rule of equity does not apply in favour of a party whose case is such that before the Judicature Act equity would not have decreed specific performance at his suit. *Per Lord Parker of Waddington in Stickney v. Keeble*, pp. 416–7.

(h) S., 10.

provides that the time of *payment* is *prima facie* not of the essence of the contract, but with respect to all other stipulations as to time their essential or inessential character is to depend on the terms of the contract. That is to say, the matter is left to be determined in accordance with the general principle of implied conditions without the help of any specific subsidiary rule. However, it may be said that *prima facie* the delivery of the goods at the due contractual date is of the essence of the contract—the sale of goods being governed in this respect by practical considerations different from those which apply to the sale of land (*i*). With respect to the nature and quality of the goods sold, the Act expressly provides that the contract is subject to an implied condition that the goods shall conform to the description under which they are sold (*k*). If on a sale of goods (not being identified specific articles (*l*)) the goods tendered by the seller fail in any respect whatever, important or unimportant, to correspond to the description under which they are sold, the buyer may reject them; and he may also, unless substituted goods in strict accordance with the description are subsequently tendered in due time, rescind the contract itself (*m*). Every such variance between the goods as tendered and the goods as described in the contract is essential as amounting to the breach not merely of an express obligation, but also of an implied condition. In this case the general principle as to implied conditions is wholly superseded by a hard-and-fast rule importing this specific condition into the contract. Every buyer of such goods is presumed to have con-

(*i*) *Reuter v. Sala* (1879), 4 C. P. D. 239, 246, 249.

(*k*) S. 13.

(*l*) As to the position where the contract deals with specific articles, see pp. 219 *et seq.*, *ante*. Such cases are commonly subsumed under the head of error or mistake. The injured party is regarded as having been induced to enter into the contract by a mistake as to the nature of its subject-matter. In the case of unascertained things, however, the notion of mistake is inapplicable. Before one can be said to be mistaken there must be some supposedly existing fact to which the mistake can relate. Where a contract contains a description of ascertained things the contents of the description are supposedly matters of fact; and this is why misdescription in such a case may be regarded as involving mistake. If the same description, however, refers to things which are not ascertained at the time when the contract is made it contains no such element of supposed fact as to which a mistake could be made, but merely amounts to a promise to provide things of that description in the future (see Sir John Salmond's judgment in *Taylor v. Combined Buyers, Ltd.*, [1924] N. Z. L. R. 627, 636). Accordingly if things of the contractual description are not duly tendered the case is regarded as one of breach of contract simply and not of mistake or error. It is apparent, however, that even where the contract relates to specific things and the case is regarded as one of error it is nevertheless also one of breach of contract, the breach being not in respect of a promissory undertaking but of a warranty as to a supposedly existing fact.

(*m*) See cases cited p. 540, n. (*u*), *ante*.

tracted to accept them on the condition that they correspond exactly with the contractual description of them. Thus in *Bowes v. Shand* (n) the buyer of a cargo described as shipped in February was held by the House of Lords entitled to reject the goods and to rescind the contract because they were shipped at the beginning of March, although for all that appeared this difference in the date of shipment was entirely immaterial to the interests of the parties or the purposes of the contract. If a man agrees to buy peas he is not obliged to accept beans, even though beans may be just as good for his purpose.

So in a contract of personal service between master and man an act of wilful disobedience (o) to the master's lawful orders, or of wilful dishonesty (p), is an essential breach entitling the master to dismiss the servant. But in respect of acts of mere negligence or inefficiency the question is one of degree not governed by any defined subsidiary rule, but left to be determined in accordance with the general principle and with reference to the importance of the breach complained of (q).

§ 195. Operation of Essential Breach; Rescission in Relation to Other Remedies

Dissolution by Breach Optional to Injured Party. In general dissolution by breach is not automatic; it does not take effect immediately and *ipso jure* by reason of the breach alone. The ordinary result of the breach is not that the contract becomes forthwith void, but that it merely becomes voidable at the election of the injured party. It is in his option whether he will rescind the contract or whether he will keep it on foot (r). In this respect the operation of a breach of contract resembles the operation of fraud in procuring the contract, and is distinguished from the operation of that essential frustration by impossibility of performance or otherwise, which automatically dissolves the contract (s).

To the rule that essential breach renders a contract voidable, not void, there appears to be one exception. If the breach is of such a nature as to frustrate the contract by rendering further performance

(n) (1877), 2 App. Cas. 455.

(o) *Turner v. Mason* (1845), 14 M. & W. 112; 153 E. R. 411; *Lilley v. Elwin* (1848), 11 Q. B. 742; 116 E. R. 652.

(p) *Willeys v. Green* (1850), 3 C. & K. 59; 175 E. R. 462.

(q) *Button v. Thompson* (1869), L. R. 4 C. P. 330, 343.

(r) *Bentsen v. Taylor*, [1893] 2 Q. B. 274, 279; *Mayson v. Clouet*, [1924] A. C. 980, 985; *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 181 ff.

(s) *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A. C. 497, 510.

on the part of the defaulting party wholly impossible, it seems that the contract is necessarily immediately and automatically terminated thereby. Thus, if, in the case of a charterparty, the shipowner should wilfully scuttle the ship, there could be no question of the charterer thereafter electing to take such partial performance as the shipowner could give because in such a case no such performance would be possible. The contract would necessarily be terminated by the breach thereof by the shipowner, not merely rendered voidable thereby (*t*). Cases of breach operating automatically to determine a contract are in practice relatively uncommon, and for the sake of simplicity in exposition we will not further notice them but will assume that the invariable effect of essential breach is to render contracts voidable merely. In other words our further discussion will be concerned only with cases where the breach operates to entitle the injured party to elect whether to rescind or affirm the contract.

Where an essential breach operates to give the injured party a right to elect between rescinding the contract and confirming it, his election may be made by any language or conduct which sufficiently manifests his intention in the matter. Moreover, any words or conduct of such a nature as reasonably to lead the other party to consider that the contract has either been rescinded or confirmed, and to act on that assumption, will amount by way of estoppel to an actual election, even though the injured party may not in fact have intended to make any election. These rules have been sufficiently illustrated and developed in connection with rescission for misrepresentation and need not be further considered here (*u*).

If in the interval between breach and rescission, and while the right of election is still pending, any event happens which *ipso jure* dissolves the contract—for example, the death of a party or supervening impossibility of performance—the right of rescission for breach is necessarily lost, and the injured party is left to his remedy of damages for the specific breach (*x*).

Rescission for Breach in Relation to Other Remedies. If the injured party elects to affirm the contract his position will depend in part on whether the breach was actual or anticipatory. In either

(*t*) See *per* Lord Wright in *Constantine Line v. Imperial Smelting Corporation*, [1942] A. C. 154, 191.

(*u*) See pp. 274, 275, *ante*. See also *Bentsen v. Taylor*, [1893] 2 Q. B. 274, and *Hindley & Co. v. General Fibre Co.*, [1940] 2 K. B. 517, 533.

(*x*) *Avery v. Bowden* (1856), 6 E. & B. 953; 119 E. R. 1119.

case on confirmation of the contract the operation of the breach as a ground for rescission comes finally to an end. The contract ceases to be voidable and becomes completely binding again on both parties. Every actual breach of contract, however, whether or not it is an essential breach, constitutes a cause of action for debt or damages; and in a proper case the injured party may sue for specific enforcement. Therefore where an actual and essential breach has occurred and the injured party has elected to affirm the contract he will nevertheless be entitled to sue for such of the remedies of debt, damages and specific enforcement as may be appropriate in respect of that breach (y). In the case of an anticipatory breach, on the other hand, the injured party who has elected to confirm the contract retains no such right of action. Although every actual breach of contract invariably confers on the injured party a right of action for debt or damages an anticipatory breach of itself has no such operation. It is only where the injured party elects to treat an anticipatory breach as a ground of rescission that (as we shall see) it may also become a cause of action for damages (z).

Where the injured party elects to rescind the contract he is entitled (in the absence of any provision to the contrary in the contract (a)), in addition to rescinding, and whether the breach was actual or anticipatory, to recover damages for the loss of the contract as a whole (b). This is so even where the breach, though essential,

(y) *Bentsen v. Taylor*, [1893] 2 Q. B. 274; *Mayson v. Clouet*, [1924] A. C. 980, 985.

(z) *Johnstone v. Milling* (1886), 16 Q. B. D. 460

(a) P. 563, *post*

(b) *Laird v. Pim* (1841), 7 M. & W. 474, 478; 151 E. R. 852, 854; *Hochster v. De la Tour* (1853), 2 E. & B. 678; 118 E. R. 922, *Frost v. Knight* (1872), L. R. 7 Ex. 111; *Noble v. Edwardes* (1877), 5 Ch. D. 378 (Bacon, V.-C.; reversed in C. A. on a ground not considered by the Vice-Chancellor); *Lodder v. Slowey*, [1904] A. C. 442, 453; *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118; *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd.*, [1909] A. C. 293, 311; *Mayson v. Clouet*, [1924] A. C. 980; *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A. C. 497, 510; *Harold Wood Brick Co. v. Ferris*, [1935] 1 K. B. 613; [1935] 2 K. B. 198; *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A. C. 154, 171, 187-8. It is sometimes said, indeed, that once a party has elected to rescind a contract for breach he cannot recover damages in respect of it, as it is no longer a subsisting contract. For this proposition *Henty v. Schröder* (1879), 12 Ch. D. 666 is commonly cited. There a vendor had obtained a decree of specific performance, but when a conveyance was tendered by him to the purchaser the purchaser refused to complete. The plaintiff therefore moved in the same action for the rescission of the contract and the staying of all further proceedings in the action except for any application to assess damages which he might make. Such an order had been made by the Vice-Chancellor in *Sweet v. Meredith* (1863), 4 Giff. 207; 66 E. R. 680. In *Henty v. Schröder*, however, Jessel, M.R., "considered that the plaintiff could not at the same time obtain an order to have the agreement rescinded and claim damages against the defendant for the breach of the agreement"; and he refused to follow (he could not, of course, overrule) *Sweet v. Meredith* in so far as it decided that the plaintiff might

is merely partial. In measuring the damages in such a case regard is had not only to the particular breach, but also to the fact of the contract having been determined by reason of that breach. Thus, if a building contract is broken by the failure of the building contractor to proceed with the work in due time, so that the building owner is entitled to rescind the contract and does so, he is entitled to recover damages, not merely for the loss so suffered by the delay up to the date of the rescission, but also for the loss suffered by him through the total non-performance of the contract, although the time for complete performance may not have arrived at the date of rescission. In other words, a partial breach which leads to rescission amounts in effect to a constructive and anticipatory abandonment of the entire contract, and in an action for damages the plaintiff's compensation is determined accordingly. In such an action for damages the plaintiff may, of course, include his loss in respect of any acts of performance which he himself may have done before rescission; and, conversely, he must reduce his claim by the amount of any benefit received by him through acts of performance done by the other party.

Where the rescinding party has himself partly performed the contract by rendering services or supplying goods he may,

have reserved to him leave to apply for the assessment of damages. *Henty v. Schroder* was followed in *Hutchinson v. Humphreys* (1885), 54 L. J. Ch. 650 (North, J.), *Jones v. Laphorne* (1893), 37 Sol. Jo. 268 (Chitty, J.), and *Jeffery v. Stewart* (1899), 80 L. T. 17 (North, J.). If these cases are to be taken as laying down a principle of substantive law they cannot stand in the face of the authorities cited at the beginning of this note. It would appear, however, that they are simply decisions on a point of practice. "It seems to me", said Swift, J., in *Harold Wood Brick Co. v. Ferris*, [1935] 1 K. B. at 615, "that all that those cases decide is that it was not appropriate in the years they were decided, in the Chancery Division, to put into one order an order rescinding the contract and an order providing for the assessment of damages for breach of contract." Both Swift, J., and the Court of Appeal ([1935] 2 K. B. 198) refused to be deterred by these decisions from allowing the injured party in that case to recover damages for the loss of the contract notwithstanding that he had rescinded for the other party's breach. Possibly some light on *Henty v. Schroder* may be derived from *Ex p. Stapleton* (1879), 10 Ch. D. 586, decided a few months before *Henty v. Schroder*. In *Ex p. Stapleton* the Court of Appeal, in a judgment delivered by Jessel, M.R., and concurred in by James and Bramwell, L.JJ., held that a vendor who had rescinded a contract for the sale of goods on account of the purchaser's default was nevertheless entitled to sue for damages for the loss of his contract. It is hardly likely that six months later Jessel, M.R., would have decided *Henty v. Schroder* on a principle conflicting with that exemplified by *Ex p. Stapleton*. As to the argument that an action for damages should not lie because the contract is at an end, the answer is that the contract remains alive for the purpose of supporting such an action by the injured party. *Johnstone v. Milling* (1886), 16 Q. B. D. 460, 473; *Michael v. Hart*, [1902] 1 K. B. 482, 490; *Guy-Pell v. Foster*, [1930] 2 Ch. 169, 188; Benjamin on Sale (7th ed.), pp. 980 ff.

instead (c) of suing for damages for the loss of the contract, sue quasi-contractually on a *quantum meruit* for reasonable compensation for what he has done (d). Presumably he will take this course where the contract would be unprofitable to him, for the reasonable compensation recoverable on a *quantum meruit* is not necessarily determined by reference to the amount (if any) fixed in the contract (e) (f). Where the rescinding party has paid money under the contract and the consideration for that payment has entirely (g) failed he may, instead of claiming damages, recover the payment as a debt in an action for money had and received to his use (h).

The remedies of rescission and damages (or *quantum meruit*, or debt for money had and received) will not, however, be cumulative if the contract provides to the contrary. It is competent to the parties by their agreement to exclude all legal remedies whatever in respect of breaches thereof (i). So much the more, therefore, may they merely modify those remedies. In particular they may provide that if the contract be rescinded for breach no damages, or only limited damages, may be claimed by the rescinding party. In *Harold Wood Brick Co., Ltd. v. Ferris* (k) the question was raised whether the right to claim damages had not been excluded by the following term: "Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the same and resell the property either by public auction or private contract subject to such stipulations as they might think fit". Swift, J.,

(c) *Goodman v. Pocock* (1850), 15 Q. B. 576; 117 E. R. 577; 2 Sm. L. C. (13th ed.), 51.

(d) *Planché v. Colburn* (1831), 8 Bing. 14; 131 E. R. 305; *Prickett v. Badger* (1856), 1 C. B. (N.S.) 296; 140 E. R. 123; *Appleby v. Myers* (1867), L. R. 2 C. P. 651.

(e) *Slowey v. Lodder* (1900), 20 N. Z. L. R. 321, 358 *per* Williams, J., in Court of Appeal. The judgment of the Court of Appeal was affirmed in the Privy Council: *Lodder v. Slowey*, [1904] A. C. 442.

(f) What the position would be if the contract had been partly performed by the defendant and the plaintiff had received such part performance before the breach is not clear. If the analogy of the action for money had and received were followed total failure of consideration would be necessary before the plaintiff could sue on a *quantum meruit*. See next note and n. (z), p. 547, *ante*. A more reasonable solution of the problem may, however, be suggested, viz., that the defendant should be entitled, as when he is sued for damages, to set off against the amount to be recovered by the plaintiff the value to the plaintiff of the defendant's part performance. Cf. *Restatement on Contracts*, vol. 2, p. 585, s. 347.

(g) P. 314, n. (i), *ante*. See also n. (z) at p. 548, *ante*.

(h) *Fitt v. Cassanet* (1842), 4 Man. & G. 898; 134 E. R. 369; *Robert A. Munro Co. v. Meyer*, [1930] 2 K. B. 312.

(i) *Rose & Frank Co. v. Crompton*, [1925] A. C. 445

(k) [1935] 1 K. B. 613; in C. A., [1935] 2 K. B. 198.

thought that the term had no such exclusionary operation, and that even if the contract were rescinded under it the vendors might still claim damages. In the Court of Appeal, Greer, L.J., took the same view. Slessor and Roche, L.JJ., expressed no opinion on this point. All three Lords Justices agreed, however, that the breach was such as to warrant rescission even in the absence of the particular term, and that the term did not provide an exclusive remedy in such circumstances. Accordingly they upheld the vendors' right to damages.

§ 196. Method and Nature of Dissolution for Breach

It remains for us to consider the method and nature of dissolution for breach. The parties may expressly provide as to this matter in their contract, or they may leave it to be determined by the law itself unaided by any such express provision. We shall first consider how the matter stands in the absence of express provision and then notice some of the ways in which the position may be modified by the express terms of the contract.

(i) *Where there is no Express Provision.* In the absence of any express term dealing with the consequences which are to flow from rescission of a contract for breach the position in this respect is the same whether the condition giving rise to the right to rescind is express or implied. The main question is: From what date does the rescission take effect? There are three different answers which the law might give to this question: First, that such rescission takes effect as from the making of the contract; second, that it takes effect as from the breach of the contract; and third, that it takes effect as from the date of the election to rescind.

Retrospective rescission ab initio.—The first of these answers is clearly not correct. Rescission for breach is different in this respect from rescission for fraud. It has been already stated that rescission for fraud is rescission *ab initio*. The election to rescind in such a case relates back to the date of the contract, and operates retrospectively, with the effect that after rescission the contract is deemed by law never to have been in force, and all questions as to the rights and liabilities of the parties in respect of transactions and events taking place in the interval between the making of the contract and the rescission thereof are determined on this assumption accordingly. But it is otherwise with rescission for supervening breach of a valid contract. This is not retrospective rescission *ab initio*, but merely

prospective rescission *in futurum*. It is merely the determination of the contract as to the future, not the constructive abolition of it as from the time when it was made. The contract has come to an end, but it is not deemed never to have existed. Intermediate acts of part-performance continue to have effect as if done under a then subsisting contract; but for the future acts of performance which would have accrued due only after the time when the contract was rescinded cannot be exacted from either party (l).

Retrospective rescission from date of breach.—Rejecting, therefore, the theory of retrospective rescission *ab initio*, the question remains whether rescission for breach of contract operates retrospectively as from the date of the breach or operates only as from the date of the actual rescission. As soon as an essential breach of the contract takes place the contract which was formerly valid and operative becomes voidable, and on actual rescission it becomes void. On the analogy of contracts voidable for fraud, in which case the rescission operates retrospectively for the whole period during which the contract was so voidable, it might be suggested that the rescission of a contract which has become voidable by breach should operate retrospectively as from the date of the breach. It seems clear, however, that this is not the case. The condition on which rescission for breach depends is not (unless, being express, it expressly provides to the contrary) a condition that the contract shall on rescission be deemed to have been void since the date on which it was broken, but that it shall be determined as for the future when the right of rescission is actually exercised. Thus, unless the particular contract otherwise provides, the dismissal of a servant for misconduct takes effect prospectively as from the date of dismissal, not retrospectively as from the date of his breach of duty (m); and so with other contracts also.

Prospective determination as from date of rescission.—It may be concluded accordingly that the rescission of a contract (unless it otherwise provides) is not retrospective rescission *ab initio*, and is not retrospective rescission as from the date when the contract became voidable for breach, but amounts exclusively to the prospective determination of the contract as from the date of

(l) Cf. *per* Bowen, L.J., in *Johnstone v. Milling* (1886), 16 Q. B. D. 460, 473. *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118. In the latter case a servant who had been wrongfully dismissed and had treated the dismissal as a repudiation of his contract of employment was held not to be bound by a term in the contract restraining his right to trade after his employment ceased.

(m) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 352, 360, 365; *Healey v. S. A. Francaise Rubastic*, [1917] 1 K. B. 946.

rescission, putting an end to the contract so far as it still remains executory on either side at that date, but leaving the contract unaffected in respect of its operation up to that date (n).

Restitutio in integrum.—From this conclusion it follows that on the rescission of a contract for breach neither party (unless the contract otherwise provides) possesses any such general right of *restitutio in integrum* as exists in the case of rescission for fraud. This right has its source in the retrospective operation of rescission *ab initio*, whereby the contract is deemed never to have been in force, and each party is accordingly entitled to recover back whatever money he has paid or property he has transferred in pursuance of that contract while it remained in existence. But in rescission for breach the contract remains operative as to the past, and therefore precludes any such claim for *restitutio* in respect of acts of performance prior to rescission. Money which has been paid or property which has been transferred by either party to the other prior to such rescission must in general stay where it is and cannot be recovered (o).

Accrued obligations and causes of action.—On the same principle every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action, remains unaffected by the rescission and can still be enforced (p). It makes no difference in this respect whether such accrued obligation and existing cause of action is one in favour of the party rescinding the contract or is one in favour of the other party. If a servant is dismissed for misconduct he can none the less sue his master for wages which have been earned and have become due and payable before the date of his dismissal (q). Similarly, he can still sue his master under the rescinded contract for damages for any personal injuries suffered by him while the contract continued, by reason of the master's breach of his con-

(n) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 365; *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A. C. 497, 510.

(o) For exceptions see pp. 567-9, *post*.

(p) *E.g.*, *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd.*, [1909] A. C. 293, where the Privy Council held that a party electing to treat a contract as determined by the other side's wrongful repudiation was entitled to recover not only damages for the loss of the contract but also "damages in respect of those breaches of it which may have been committed before repudiation" (p. 311). To the general rule stated in the text there is an exception where, if the money had already been paid by the defaulting party it could have been recovered by him on the principle stated, *post*, at p. 568 *et seq.*; cf. p. 529, *ante*.

(q) *Taylor v. Laird* (1856), 1 H. & N. 266; 156 E. R. 1203; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 360, 366; *Parkin v. South Hetton Coal Co., Ltd.* (1907), 24 T. L. R. 193.

tractual duty to take reasonable care for his servant's safety (r). Obligations, on the other hand, which have not already accrued due (s) at the date of rescission are finally destroyed by the rescission. No cause of action for the enforcement of a contract can come into existence for the first time after that contract has been determined (t).

Position of parties after rescission.—In respect of both of the foregoing principles—i.e., the denial within the limits indicated of *restitutio in integrum* and the allowance of accrued obligations and causes of action—both of the parties to the rescinded contract are in the same position. These rules apply to each of them equally. As to other matters, however, they are in essentially different positions. The injured and rescinding party has, as we have already indicated, in addition to the right of rescission the cumulative right of suing for damages for the loss of the entire contract. Alternatively he may sometimes claim on a *quantum meruit*; and if he has paid money he may sometimes be able to recover it in debt as money had and received to his use (u).

What, however, is the position of the other party to the determined contract—the party through whose breach the rescission has come about? Has he any right or remedy at all in respect of his partial execution of the contract before its rescission? Take the case where he has rendered services in part performance of the contract. If A, for example, contracts to build a house on B's land for the lump sum of £5,000 payable on completion, and after doing work worth £2,000 on B's land abandons the contract or commits some other essential breach of it, B may rescind and determine the contract. In such a case can A recover from B any compensation for the work so done by him, or is B, on the contrary, entitled to retain the benefit of the work so done upon his land and pay nothing for it? It may be thought that it would not have been difficult for the law in such cases to create an implied contract under which the party in default might, notwithstanding the rescission of the express contract, recover on a *quantum meruit* the actual value to the rescinding party of the other's part-performance. But this the law has resolutely refused to do. It seems to be established as a

(r) As to this duty see p. 58, *ante*.

(s) It would seem that a debt which has vested at or before but is not payable until after rescission is to be regarded as having accrued due and is not destroyed by the rescission. *Button v. Thompson* (1869), L. R. 4 C. P. 330, 339. Cf. *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 365.

(t) *General Billposting Co., Ltd. v. Atkinson*, [1909] A. C. 118.

(u) See pp. 562–3, *ante*.

general principle that the party in default has no such right or remedy. He cannot sue on the express contract, for it contained no term providing for payment otherwise than on completion of the work; and the law refuses to recognise in his favour any substituted implied contract under which he may recover compensation for his expenditure and services before rescission (x).

As, in the absence of an express term to the contrary in the contract, the law refuses to allow the defaulting party to recover anything in respect of services rendered unless a right to such recovery has vested at or before the rescission of the contract, so logically it should to the same extent refuse to allow recovery in the case of other forms of part performance. In one case, however, *viz.*, where the part performance takes the form of the payment of money, the law does appear to recognise a right of recovery in the defaulting party notwithstanding the absence of any express provision to that effect in the contract. In *Dies v. British and International Corporation* (y) the plaintiff was the assignee of one Q., who had agreed to purchase of the defendant certain goods for the price of £270,000. Of this sum the purchaser paid £100,000, but thereafter in breach of the contract he neither completed payment nor took delivery of any part of the goods. The defendant therefore elected to treat the contract as at an end. The plaintiff now claimed the return of what had been paid. The defendant counterclaimed for damages for breach of contract. Stable, J., decided that the plaintiff was entitled at law to recover the £100,000, subject to a set-off by the defendant in respect of the damages which he might recover on his counterclaim. "In my judgment", said the learned Judge (z), "the real foundation of the right [to recover the £100,000] which I hold exists in the present case is not a total failure of consideration but the right of the purchaser, derived from the terms of the contract (a) and the principle of law applicable, to recover back his money. . . . In my judgment there would be a manifest defect in the law if, where a buyer had paid for his goods but was unable to accept delivery, the vendor could retain the goods and the money quite irrespective of whether the money so retained

(x) *Lilley v. Elwin* (1848), 11 Q. B. 742; 116 E. R. 652; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339; esp. pp. 364-5; *Sumpter v. Hedges*, [1898] 1 Q. B. 673; *Forman & Co. Proprietary v. The Ship Liddesdale*, [1900] A. C. 190.

(y) [1939] 1 K. B. 724.

(z) At p. 744.

(a) This seems to mean, "from the fact of the contract not containing an express term that the payment should not be recoverable in the event which had occurred".

bore any relation to the amount of the damage, if any, sustained as a result of the breach. The seller is already amply protected, since he can recover such damage as he has sustained and can, it seems, set off his claim for damages against the claim for the return of the purchase price" (b).

(b) See also *McDonald v. Dennys Lascelles, Ltd.* (1933), 48 C. L. R. 457, which was decided by the High Court of Australia on the basis of a defaulting purchaser of land being entitled to recover instalments of purchase-money other than a deposit from a vendor rescinding for essential breach. Dixon, J., in whose judgment Rich and McTiernan, JJ., concurred, explained the defaulting party's right of recovery as resting on an implied condition (p. 477) - "When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract".

There is little prior authority to support *Dies v. British and International Corporation* and *McDonald v. Dennys Lascelles, Ltd.*, and at least one case (*Fitt v. Cassanet* (1842), 4 Man. & G. 898; 131 E. R. 369) which appears to be an authority to the contrary. In *Dies v. British and International Corporation* reliance was placed by the learned Judge upon the disapproval by the Privy Council in *Mayson v. Clouet*, [1921] A. C. 980, 985, of a dictum which fell from Bankes, L.J., in *Harrison v. Holland*, [1922] 1 K. B. 211, 213. In *Harrison's Case* a contract for the sale and purchase of land provided for a deposit of £50,000 and a further payment of £100,000, and as to these the contract provided "if the purchasers fail to comply with the stipulations hereof their deposit of £50,000 but not the said sum of £100,000 shall be forfeited. . .". The purchaser defaulted and the vendors claimed to hold the £100,000 pending resale to recoup them for any loss which might result. The Court of Appeal decided against this contention, saying that it was simply a question of the interpretation of the particular contract. Bankes, L.J., however, added - "If nothing more had been said about it, as the contract came to an end in consequence of the purchaser's own default neither they nor their assignee would have been able to get the money back. But it is expressly provided that it is not to be forfeited". It was this passage which the Privy Council disapproved. It is to be observed, however, that the effect of what Bankes, L.J., said and the Privy Council disapproved was not that where a contract providing for instalment payments is rescinded by the payee for the payer's breach the instalments cannot be recovered back in the absence of any special provision. It was that in a contract providing for a deposit as well as instalments this was the position. But to call a payment a deposit is, in view of the well-understood meaning of that word (see *Soper v. Arnold* (1889), 14 App. Cas. 429, 435, and *Hall v. Burnell*, [1911] 2 Ch. 551), equivalent to saying that it is to be forfeitable if the contract goes off for the payer's default. And where one payment is distinguished from the rest by being expressly declared to be forfeitable (whether by calling the payment a deposit or otherwise) the inference from silence as to the others would seem to be, not, as Bankes, L.J., suggested, that they were to be forfeitable, but that they were not to be forfeitable. This was what was actually decided in *Mayson v. Clouet* and why, it may be suggested, the Privy Council disapproved of Bankes, L.J.'s dictum.

Another passage in the Privy Council's judgment in *Mayson v. Clouet* relied upon in *Dies v. British and International Corporation* relates to *Howe v. Smith* (1884), 27 Ch. D. 89, a case in which the Court of Appeal held that a deposit could not be recovered by a purchaser of land through whose default the sale had gone off. The Court said that the question turned upon the conditions of the contract. "Now", said the Privy Council (p. 986), "all the elaborate argument that followed as to whether the condition attached to that particular deposit was quite unnecessary if the case could have been solved by the simple proposition . . . you are in default as to the contract and the party not in default may keep anything that he has got from the partial fulfilment of the contract". It is sub-

Notwithstanding the general denial of *restitutio in integrum* where a contract is rescinded for breach, either party is entitled to recover from the other any property of which the possession only and not the title has passed to that other at the date of rescission.

mitted, however, that when *Howe v. Smith* is considered in relation to the earlier case of *Palmer v. Temple* (1839), 9 A. & E. 508; 112 E. R. 1304, their Lordships' comment proves to be ill-founded. The plaintiff in *Howe v. Smith* claimed the return of his deposit not on the ground that rescission for breach *prima facie* involved *restitutio in integrum* but on the view that *Palmer v. Temple* established that his contract, on its proper interpretation, contained a promise by the vendor to refund the deposit. See 27 Ch. D. p. 93. It was because of this contention that the "elaborate argument" to which the Privy Council refer took place.

In *Palmer v. Temple* the question was whether a defaulting party could recover his deposit where the contract provided that if either party made default he should pay to the other £1,000 as liquidated damages. It was held by the Court of Queen's Bench that the deposit could be recovered. "The ground upon which we rest this opinion", said Lord Denman, C.J. (p. 520, E. R. 1309), "is, that, in the absence of any specific provision, the question . . . depends, on the intent of the parties to be collected from the whole instrument; but, as this imposes on either party that should make default a penalty of £1,000, the intent of the parties is clear, that there should be no other remedy. . . . The consequence appears to be that this vendor may sue for the penalty, and recover such damages as a jury may award; but he cannot retain the deposit, for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser". The last sentence of this passage may possibly mean that in the Court's view one rescinding a contract for breach must refund any moneys which have been paid to him in the absence of an express agreement to the contrary. Dixon, J., in *McDonald v. Dennys Lascelles, Ltd.*, cites it as authority for his view that such payments are impliedly conditional on the transaction being completed. Another interpretation is, however, possible. It may be that "part payment" and "payment" take their colour from the provision as to liquidated damages, and that the Court's meaning is that the idea of payment falls to the ground because by inference from the liquidated damages provision the payment was to be returned in the events which occurred.

The foregoing *dicta* seem a somewhat exiguous foundation for the decisions in *Dies'* and *McDonald's Cases*. *Fitt v. Cassanet* seems actually to be in conflict with those decisions. In that case A had agreed to buy goods of B, and at the time of entering into the contract paid £22 on account of the price. B delivered part of the goods whereupon A rejected that part as not corresponding with the sample and refused to receive more. B sold the residue to other parties. A claimed to recover the £22 on the ground, *inter alia*, that B had disabled himself from performing the contract by reselling the undelivered part of the goods. The Court held, however, that this depended on whether the resale took place before or after the plaintiff had himself refused to perform the contract. After verdict the inference to be drawn was that the resale took place after the plaintiff's refusal, and as the Court regarded this refusal as not otherwise justifiable, it therefore constituted a wrongful repudiation which the defendant had elected to accept. Under these circumstances the plaintiff was held not to be entitled to recover his money. "It is difficult to see", said Tindal, C.J. (p. 903, E. R. 371), "how an action for money had and received could be maintained by the plaintiffs unless they were in a situation to recover upon the original contract. The action for money had and received would be a compendious form of recovering back the deposit, but it would stand upon the same footing as the right to sue on the contract. But in order to recover upon that, the plaintiffs must have averred that they were ready and willing to perform their part of the contract, and in the proof of that allegation they must have failed". It does not appear that by the casual use of the word "deposit" Tindal, C.J., meant to imply that the payment

If the property is land it may be recovered in an action of ejectment (c). If it is a chattel and the party who has possession of it fails or refuses to return it the other party may sue for damages for the tort of conversion or, in some cases (d), waiving the conversion, quasi-contractually for the value of the chattel. In such cases the plaintiff, whether the defaulting party under the contract or not, is not relying on the rescinded contract but on his ownership of the land or chattel; and, conversely, the defendant cannot justify his further retention of the possession of the land or chattel, because his right to retain that possession was based solely on the rescinded contract and lasted only so long as that contract lasted.

(ii) **Where Contract Contains Special Provision as to Method of Dissolution for Breach.** In the foregoing statement of the results of rescission for breach we have assumed the absence in the contract of any special provision on the matter. The parties may, however, expressly provide that results other than those we have indicated should ensue if the contract should be so rescinded. They may provide, for example, that the defaulting party shall be entitled to recover as on a *quantum meruit* for any performance he may have rendered. Or they may provide that the defaulting party shall forfeit anything that he may have done by way of part performance, and in particular any instalments of money that he may have paid. A statement that a particular sum is to be regarded as a deposit is *prima facie* a statement that it is to be forfeited if the contract goes off through the payer's default (e). In *Mayson v. Clouet* (f) the Privy Council held that the parties by distinguishing the first of a series of payments as a deposit and declaring that it should be forfeitable if the payee rescinded the contract for the payer's default

had been intended as an earnest. Earlier in his judgment (p. 903, E. R. 371), he had described the sum as "the money which was paid to him [the defendant] on account thereof [i.e., of the contract]". In the Law Journal report (12 L. J. C. P. 71, 72) but not in Manning and Granger there then follows: "and therefore that the plaintiff is entitled to recover back his deposit". On the other hand the reference to "deposit" in the first passage quoted from Manning and Granger does not appear in the Law Journal. None of the other Judges, as reported both in Manning and Granger and the Law Journal, refers to the payment as a deposit; and no point based on its being a deposit in the strict sense was taken either on the pleadings or in argument.

(c) *Laird v. Pim* (1841), 7 M. & W. 474, 478; 151 E. R. 852, 854.

(d) As to when the tort of conversion may be waived and a claim sustained in quasi-contract see Salmond, *Torts* (10th ed.), 181-5, *Nicol v. Hennessy* (1896), 1 Comm. Cas. 410; 44 W. R. 584, *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A. C. 1, and Lord Wright's essay thereon in 57 L. Q. R. 184.

(e) See p. 569, *ante*, n. (b).

(f) [1924] A. C. 980.

in effect provided that the other payments should not be forfeitable if the contract should be rescinded for the payer's default (g).

While, however, a provision that a defaulting party shall forfeit all moneys paid is effective at common law, it may be construed in equity as a penalty (h) and relief granted against it accordingly. This may be illustrated by *Steedman v. Drinkle* (i). There land was sold for a price of which part was paid on the signing of the contract and the balance was to be paid in instalments. The contract provided that if the purchaser should make default in paying any of the instalments the vendor should be at liberty to cancel the contract and retain the moneys already paid. Time was to be of the essence of the contract. Default having been made in payment of the first instalment the vendor cancelled the contract and claimed to forfeit the money already paid. Assignees of the purchaser thereupon sued for specific performance or alternatively relief against forfeiture of their interest under the contract and in the land. The Privy Council held that the purchaser's assignees were not entitled to specific performance, but that the forfeiture of the money was a penalty from which relief should be granted upon proper terms (k). It would seem that as a condition of obtaining such relief the defaulting party must ordinarily offer to perform the contract (l). Presumably no such offer need be made, however, if the rescinding party has already put it out of his power to perform the contract.

(g) As to whether the contract in this respect merely affirmed the common law position in the absence of express provision see p. 568, *ante*.

(h) As to what constitutes a penalty see pp. 580 *et seq.*, *post*.

(i) [1916] 1 A. C. 275.

(k) See further *Re Dagenham (Thames) Dock Co., ex p. Hulse* (1873), L. R. 8 Ch. 1022; *Cornwall v. Henson*, [1900] 2 Ch. 298, 304; and *Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319. Relief was refused in *Mussen v. Van Diemen's Land Co.*, [1938] Ch. 253.

(l) *Mussen v. Van Diemen's Land Co.*, [1938] Ch. 253, 265-6; *McDonald v. Denny's Lascelles, Ltd.* (1933), 48 C. L. R. 457, 478. Cf. *Jervis v. Berridge* (1873), L. R. 8 Ch. 351.

CHAPTER XXIII

THE DISSOLUTION OF WRITTEN CONTRACTS
BY ALTERATION§ 197. Nature and Principle of Rule as to Dissolution of Written
Contracts by Alteration

A written contract which subsequently to its making is, without the consent of one party (a) (b), materially altered by or with the consent of the other party, or by a stranger (c) while it is in that other party's custody, thereby becomes voidable at the election of the former party (d).

This rule, which has little substantial merit to recommend it (e), was at first applied to deeds, and as thus applied was a consequence of the primitive notion whereby the contract created by the deed was inseparably identified with the parchment, ink and wax expressing it. On this view the continued existence of the contractual obligation was necessarily dependent on the continued existence of the deed in the form in which it declared the obligation. If the deed should cease to exist in that form, therefore, the obligor ceased to be bound (f). At a comparatively late time the rule came to be applied to contractual instruments other than deeds; and in *Master v. Miller* (g), the case in which this extension had its origin, the Judges made strenuous efforts to rationalise the rule in such a manner as to justify its application to written contracts in general. Lord Kenyon, C.J., considered that the rule was intended to punish the party making the alteration. "And why", he asked (h), "in

(a) Party, as used in this chapter, includes one who, in accordance with the rules stated, p. 383, *ante*, is bound by or entitled under a deed although not technically a party thereto.

(b) *Hamelin v. Bruck* (1846), 9 Q. B. 306; 115 E. R. 1290; *Rudd v. Bowles*, [1912] 2 Ch. 60; *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314.

(c) As to this see Norton, *Deeds* (2nd ed.), 44, and *per* Lord Herschell in *Lowe v. Fox* (1887), 12 App. Cas. 206, 217.

(d) *Pigot's Case* (1614), 11 Rep. 26 b; 77 E. R. 1177; *Master v. Miller* (1791), 4 T. R. 320; 100 E. R. 1042; (1793), 2 H. Bl. 141; 126 E. R. 474 (in Ex. Ch.); 1 Sm. L. C. (13th ed.), 780; *Powell v. Divett* (1812), 15 East 29; 104 E. R. 755; *Davidson v. Cooper* (1843), 11 M. & W. 778; 152 E. R. 1018; 13 M. & W. 343; 153 E. R. 142; *Bishop of Crediton v. Bishop of Exeter*, [1905] 2 Ch. 455.

(e) Holmes, *Path of the Law*, 10 Harv. L. R. 457, 472-3, reprinted in *Collected Legal Papers*, 167, 192-3.

(f) Holmes, *ubi supra*.

(g) *Supra*.

(h) P. 329; E. R. 1047.

point of policy, would it [the alteration] have had that effect [avoidance] in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanour: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanour, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same." This explanation, however, is not historically sound; and it is not satisfying as an exposition of the modern policy of the law, for remedies in contract are not punitive but compensatory or reparative. Even when an action may be maintained for fraud the damages are compensatory merely (*i*) (*k*). In the same case Ashhurst, J., gave a different explanation of the rule. "All written contracts", he said (*l*), "whether by deed or not, are intended to be standing evidence against the parties entering into them. . . . It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke . . . it was their business to preserve the bill without any alteration."

It is submitted that the passages quoted from Ashhurst, J., indicate the principle upon which the rule, extending as it now does to all contractual instruments, must at the present day be supported. The presumed purpose of the party or parties in reducing the contract to writing is to provide an authentic record of it beyond the reach of future controversy, bad faith or treacherous memory (*m*), and plainly this purpose would tend to be defeated if the instrument were not to be preserved in an unaltered state. The law, therefore, in favour of a party bound by a written contract, reads it subject to the condition that no material alterations in it shall without his consent be made by the other party or by anyone else while the contract is in the custody of the other party. As was said by Lord Denman, C.J., delivering the judgment of the Exchequer Chamber in *Davidson v. Cooper* (*n*), "a party who has the custody of an instrument made for his benefit, is bound to preserve it in its

(*i*) As to the distinction between compensatory and punitive damages see p. 579, *post*.

(*k*) As to Lord Kenyon's explanation see Holmes, *ubi supra*.

(*l*) P. 331; E. R. 1048.

(*m*) Phipson, *Evidence* (7th ed.), 552; Taylor, *Evidence* (12th ed.), vol. 2, 723.

(*n*) (1844), 13 M. & W. 343, 352; 153 E. R. 142, 146.

original state. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part ”.

§ 198. Material Alteration

Such being the general character and principle of the rule, it remains to notice some of its more important details. In the first place it applies only to material alterations. What is a material alteration is a question of law (*o*). In answering this question regard must be had to the nature of the instrument and the purpose for which it is used. The alteration need not necessarily be in some part of the instrument declaring the terms of the contract between the parties. Accordingly the alteration of the number of a Bank of England note has been held to be material (*p*). The following alterations to a bill of exchange, cheque or promissory note had all been held material before the Bills of Exchange Act, 1882, and are now so declared by section 64 (2) (*q*) of the Act, *viz.*: “ any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor’s assent ”. It appears that an alteration may be material although it is in favour of or does not prejudice the party seeking to avoid the instrument (*r*).

An accidental alteration does not come within the rule (*s*).

§ 199. Extent to which Contract Avoided by Material Alteration

The effect of a material alteration is not to avoid the instrument but to render it voidable. Moreover, the party entitled to avoid the instrument cannot by so doing acquire against the other party rights more extensive than were given by the contract. The rule is a shield and not a sword. Thus in *Pattinson v. Luckley* (*t*) A had done certain work for B under a building contract but was unable to recover for the work because of the non-fulfilment of a condition precedent. He therefore sought to avoid the contract on the ground

(*o*) *Vance v. Lowther* (1876), 1 Ex. D. 176.

(*p*) *Suffell v. Bank of England* (1882), 9 Q. B. D. 555.

(*q*) Applicable to cheques and promissory notes, ss. 73, 89.

(*r*) *Gardner v. Walsh* (1855), 5 E. & B. 83; 119 E. R. 412.

(*s*) *Hong Kong Bank v. Lo Lee Shi*, [1928] A. C. 181.

(*t*) (1875), L. R. 10 Ex. 330.

of material alteration and to recover on a *quantum meruit* in respect of the work. It was held, however, that although the contract might be avoided for the future it existed when the work was done and therefore on the principle *expressum facit cessare tacitum* it excluded the implication of a contract to pay a reasonable sum for the work. In other words the avoidance operated prospectively merely and not *ab initio*. Consistently with this it was doubted by Bramwell, B. (u), whether if the party entitled to avoid had before avoiding committed breaches of the contract he could protect himself from liability for those breaches by thereafter electing to determine the contract.

So far as bills of exchange, cheques and promissory notes are concerned the law as to the extent to which an instrument may be avoided for material alteration is now declared in the Bills of Exchange Act, 1882 (x), and in regard to these instruments is subject to the proviso that where the alteration is not apparent and the instrument is in the hands of a holder in due course, that holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenour.

(u) At p. 334.

(x) Ss. 64, 73, 89.

PART VI

JUDICIAL REMEDIES

The remedies available in respect of a breach of contract may, according to the circumstances, be as follows:—

- either (1) rescission together with damages or recovery by way of *quantum meruit* or *valebat* or money had and received;
- or (2) damages;
- or (3) debt, with or without damages by way of interest;
- or (4) specific performance, with or without damages or compensation;
- or (5) injunction, with or without damages.

We have already sufficiently considered rescission for breach and *quantum meruit*, *quantum valebat* and money had and received as remedies incidental to rescission. We shall be concerned in this part and chapter with the common law remedies of debt and damages and the equitable remedies of specific performance and injunction.

CHAPTER XXIV

JUDICIAL REMEDIES

§ 200. Debt, Damages, Specific Performance and Injunction

Debt is the remedy in respect of such promises to pay a liquidated sum of money as the common law enforces specifically (a). The common law compels the promisor to do the very thing (albeit somewhat tardily) which he has promised, *viz.*, pay the specified amount of money. Damages are the common law remedy in respect of all other promises and of warranties. In such cases the common law does not compel the undertaking party specifically to perform his undertaking but compels him to pay a pecuniary substitute for

(a) Cf. Lord Mansfield in *Robinson v. Bland* (1761), 1 W. Bl. 234, 256, at 263; 96 E. R. 129; 141 at 143: "But we all know that in actions upon contracts for the payment of money, the damages are nominal; the true relief consists in the specific performance".

such performance. In cases where the principal remedy is debt, damages, which according to the circumstances may be either substantial in the form of interest or nominal, may sometimes be awarded in respect of the failure of the debtor to make punctual payment.

Specific performance and injunction are equitable remedies, the former being applicable in appropriate circumstances to enforce *in specie* contracts containing promises to do some positive thing other than pay money, the latter to enforce *in specie* negative promises. Each of these remedies may in appropriate circumstances be combined with damages; and in some cases deficiencies of performance where specific performance is decreed are adjusted by the award of compensation.

§ 201. Damages

The damages which may be recovered for breach of contract are either nominal or real. Nominal damages are a small sum of money—*e.g.*, a shilling—awarded not by way of compensation for any actual loss suffered, but merely in recognition of the existence of some legal right vested in the plaintiff and violated by the defendant. Nominal damages are awarded in cases of *injuria sine damno*. Real damages, on the other hand, are those which are assessed and awarded as compensation for damage actually suffered by the plaintiff, and not simply by way of mere recognition of a legal right violated. They represent not merely *injuria* but also *damnum*. Merely that such damages are small does not make them nominal (*b*).

All breaches of contract give rise to claims for at least nominal damages, even though no actual damage at all may have been suffered by the plaintiff (*c*).

Real damages claimed for breach of contract may be either general or special. General damages are compensation for general damage; special damages for special damage. General damage is such as the law will presume to be the direct natural or probable consequence of the act complained of. Special damage, on the other hand, is such as the law will not infer from the nature of the act (*d*). The distinction is of significance in the law of pleading and procedure

(b) *The Mediana*, [1901] A. C. 109, 116; Salmond, *Torts* (10th ed.), 122.

(c) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 109 E. R. 842; *Société des Hôtels le Touquet Paris-Plage v. Cummings*, [1922] 1 K. B. 451. The general statement in the text requires qualification where the breach consists in failure to pay a debt on due date: see p. 592, n. (l), *post*.

(d) *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A. C. 515, 525–6; see also *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 528.

rather than in the substantive law. Before substantial damages may be recovered on account of either general or special damage that damage must be satisfactorily proved by evidence (e). In the case of special damage, however, the plaintiff may not even lead evidence in the matter unless he has alleged such damage with reasonable particularity in his pleadings. The principle behind the distinction is that the mere narration of the contract and its breach is a sufficient warning to the defendant of the nature of the plaintiff's claim in so far as that claim is for damage which common experience shows is the normal result in the case of such a breach of such a contract. Where damage of an abnormal kind is complained of, however, the defendant is not adequately warned of the claim against him unless that damage is expressly and particularly pleaded. In *Ströms Bruks Aktie Bolag v. Hutchison* (f), the plaintiff, a Swedish manufacturer of wood-pulp, entered into a charterparty with the defendants to carry a quantity of wood-pulp to Cardiff at a specified time. The plaintiff made this contract to enable him to fulfil a contract he had already made to supply wood-pulp at the time and place of delivery under the charterparty. The defendants wholly failed to fulfil the charterparty. Lord Macnaghten, in whose judgment Lord James concurred, expressed the opinion that the plaintiff could prove and recover as general damages the difference between the cost of replacing the goods at the place of destination at the time when they should have arrived, less the value of the goods in Sweden and the freight and insurance. So a trader, whose cheque is dishonoured by his banker while the banker has in his hands sufficient available funds of the trader to meet it, may recover from the banker general damages for the injury to the trader's credit resulting from the breach of the banker's contract to honour the cheque (g). Whether in any given case damage is general or special is a question of law depending either on the special circumstances of that case or of the class of cases of which that case is one.

Real damages are either compensatory or exemplary. The latter are also called vindictive or punitive. Compensatory damages are those given as compensation for and measured by the material loss suffered by the plaintiff. Exemplary damages are a sum of money awarded in excess of any material loss and by way of *solatium* for any insult or other outrage to the plaintiff's feelings that is involved

(e) *Aerial Advertising Co. v. Batchelors Peas, Ltd.*, [1938] 2 A. E. R. 788, 795.

(f) [1905] A. C. 515, 525-6.

(g) *Wilson v. United Counties Bank, Ltd.*, [1920] A. C. 112, 132-3. See also *Aerial Advertising Co. v. Batchelors Peas, Ltd.*, [1938] 2 A. E. R. 788.

in the injury complained of (*h*). Exemplary damages are of very much more importance in the law of torts than in the law of contract. They may be awarded in respect of the breach of only one kind of contract, *viz.*, a contract to marry (*i*).

Real damages for breach of contract may be liquidated, limited, or at large. These three kinds of damages will respectively form the subjects of the next three sections.

§ 202. Liquidated Damages: Penalties

Damages in respect of a breach of contract are said to be liquidated where the contract itself effectively provides either what amount is to be paid in respect of that breach, or a means whereby that amount may be ascertained by arithmetical computation. Thus in *Clydebank Engineering and Shipbuilding Co. v. Don Jose* (*k*) the Spanish Government, which had contracted with a shipbuilder for the construction of certain warships within a stipulated time, was held entitled to enforce a provision in the contract that if the ships were not delivered in time the shipbuilder should pay £500 for each week's delay in respect of each ship (*l*).

A provision in a contract that a fixed or ascertainable sum shall be payable on breach will not be effective if the sum amounts to a penalty, but in such a case the same damages will be recoverable as if there were no such provision (*m*). Penalty, in this context, means a sum which may (*n*) or does so exceed the damage reasonably likely to result from the breach for which it is to be paid that its purpose must be taken to be not merely the compensation of the injured party but also the punishment of the defaulter (*o*). It is not, indeed, to be supposed that a term in a contract providing for the payment of a fixed sum upon default in performing some other

(*h*) Salmond, *Torts* (10th ed.), 125-7. It has been held in the Court of Appeal that a Judge trying a case without a jury may reprimand the defendant instead of awarding exemplary damages. *Rook v. Fairrie*, [1941] 1 K. B. 507. See, however, *per* Goddard, L.J., in *Knupffer v. London Express Newspaper, Ltd.*, [1943] K. B. 80, 91.

(*i*) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488; *Berry v. Da Costa* (1866), L. R. 1 C. P. 331.

(*k*) [1905] A. C. 6.

(*l*) For further illustrations see *English Hop Growers, Ltd. v. Dering*, [1928] 2 K. B. 174; *Imperial Tobacco Co. v. Parslay*, [1938] 2 A. E. R. 515.

(*m*) *Wall v. Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66; *Watts, Watts & Co., Ltd. v. Mitsui*, [1917] A. C. 227. See also p. 582, *post*.

(*n*) See pp. 581-2, *post*.

(*o*) In *Cellulose Acetate Silk Co. v. Widnes Foundry* (1925), *Ltd.*, [1931] 2 K. B. 393 (before Wright, J., and Court of Appeal), [1933] A. C. 20, it was contended that if a contract provided for the payment of a sum manifestly less than the probable loss that sum would be a penalty. This contention found favour with Wright, J., but was rejected in the Court of Appeal and House of Lords.

obligation is to be regarded as providing for a penalty merely because it operates as a deterrent of such a default. The ordinary obligation to pay damages operates in this way. The essence of a provision for a penalty is not merely that it should deter but that it should deter because it purports to require that the defaulting party shall or may pay a sum manifestly exceeding the damage which may reasonably be anticipated as likely to result to the other party from the default. "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage" (p).

Whether in any particular case a fixed or ascertainable sum declared to be payable on a breach of contract is to be regarded as liquidated damages or a penalty is a question of construction to be decided upon the terms and circumstances of the particular contract as at the time of its making and not at the time of the breach (q).

To assist this task of construction various tests have been suggested. Lord Dunedin, in his notable judgment in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (r), mentions the following:—

"(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case* (s).)

"(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is greater than the sum which ought to have been paid (*Kemble v. Farren* (t)) . . .

"(c) There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.* (u)) (x). On the other hand:

(p) Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1915] A. C. 79, 86

(q) *Ib.*, p. 86-7.

(r) *Supra.*

(s) [1905] A. C. 6.

(t) (1829), 6 Bing. 141; 130 E. R. 1234.

(u) (1886), 11 App. Cas 332.

(x) So a sum to be ascertained by a method bearing no relation to the seriousness and extent of the breach on which it may be payable, and which may be greater or less than the damage flowing from that breach, will generally be a penalty. *Public Works Commissioner v. Halls*, [1906] A. C. 368.

“(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury (y); *Webster v. Bosanquet*, Lord Mersey (z)).”

One further rule may be added, viz., that subject to the rules stated by Lord Dunedin, a “rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in the case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not a penalty” (a).

§ 203. Limited Damages

Damages may be described as limited where the contract stipulates that they shall not exceed a defined amount. It is clear on principle that such a provision will be valid and effective. The parties may, if they wish, by a term in their contract exclude all legal remedies whatsoever in respect of that contract (b); they may exclude all such remedies in respect of the breach of one particular term (c); it necessarily follows, therefore (*omne majus continet in se minus*), that they can, if they so wish, exclude the remedy of damages to a limited extent only, viz., beyond a stated maximum (d).

A mere limitation on the amount of damages to be recoverable on the breach of a contract cannot constitute a penalty (e). It might have been supposed, however, that a provision for a penalty although void as such could in appropriate circumstances have operated as a limitation on damages; but the weight of authority appears to deny even this limited operation to a penalty clause (f).

(y) [1905] A. C. at p. 11

(z) [1912] A. C. at p. 398.

(a) *Law v. Local Board of Redditch*, [1892] 1 Q. B. 127, per Lord Esher, M.R., 180; *Strickland v. Williams*, [1899] 1 Q. B. 382.

(b) *Rose and Frank v. Crompton*, [1925] A. C. 445.

(c) *Cellulose Acetate Silk Co. v. Widnes Foundry (1925), Ltd.*, [1933] A. C. 20, 25-6.

(d) *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, [1908] 2 K. B. 626; *Watts, Watts & Co., Ltd. v. Mitsui*, [1917] A. C. 227, 235.

(e) See p. 580, n. (o), ante.

(f) In *Public Works Commissioner v. Hills*, [1906] A. C. 368, the Privy Council apparently considered that a penalty clause might limit the damages recoverable. In that case a contract by a railway engineer with the South African

§ 204. Damages at Large: Remoteness of Damage

Where real damages are not liquidated or limited they may be said to be at large (g).

The ideal principle towards which the law tends in the assessment of damages for breach of contract where damages are at large is (except in the case of exemplary damages—throughout this section we shall consider principles relative to compensatory damages only) that such a sum of money shall be awarded as will put the injured party in the same position as he would have been in had the contract been duly performed (h) (i). Practically, however, this ideal is not very frequently attained (k).

Remoteness of Damage. The law will not necessarily compel a wrongdoer, whether defaulter under a contract or tortfeasor, to compensate the injured party for all the harm resulting to the injured party from the wrong, but limits his liability to those consequences of his wrong which are not unreasonably remote.

The leading authority on the question of remoteness of damage in contract is *Hadley v. Baxendale* (l) in which the Court of Exchequer laid down the law in the following terms (m): "Now we think the proper rule in such a case is this: where two parties

Government for the construction of certain railways contained a clause imposing a penalty in the case of delay. The Privy Council, remarking (p. 375) that a penalty "covers the damage if proved, but does not assess it", held (p. 376) that the Government was entitled "to prove such damages not exceeding the sums in the penalties", as they could make out. The Privy Council's decision on this point, however, appears to be in plain conflict with the decision of the House of Lords in *Watts, Watts & Co., Ltd. v. Mitsur*, [1917] A. C. 227, approving *Wall v. Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66, and must, it is submitted, be regarded as erroneous. Cf. Lord Atkin in *Cellulose Acetate Silk Co. v. Widnes*, [1933] A. C. 20, 26.

(g) This phrase appears in the judgment of Lord Esher, M.R., in *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. 147, 153. Lord Esher was speaking of liability for the tort of inducing a breach of contract and appears to have meant by the phrase damages the exact amount of which cannot be precisely proved but which must be quantified by the jury in a reasonable manner having regard to all the circumstances. Cf. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. See also *Ferning Film Service, Ltd. v. Wolverhampton, etc., Ltd.*, [1914] 3 K. B. 1171, 1174. The phrase is used above in a wider sense than that in which Lord Esher used it.

(h) *Robinson v. Harman* (1848), 1 Ex. 850, 855; 154 E. R. 363, 365; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, 307; *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A. C. 452, 457; *Sunley & Co. v. Cunard White Star, Ltd.*, [1940] 1 K. B. 740, 745.

(i) As to the case where the contract prescribes alternative forms of performance see p. 194, *ante*.

(k) 48 L. Q. R. 107; Halsbury, *Laws of England* (2nd ed.), vol. 10, p. 83.

(l) (1854), 9 Ex. 341, 355; 156 E. R. 145, 151; 2 Sm. L. C. (13th ed.), 529, 540. This case was considered with very great care. As to this and the sources of the principles enunciated in the judgment see 48 L. Q. R. 102 ff.

(m) Taken from 2 Sm. L. C. (13th ed.), pp. 540-1.

have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them" (n).

In the foregoing passage "damages . . . such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of the contract itself" and "[damages] such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" are not definitions of different measures of damage but alternative definitions of the same measure. It scarcely needs argument to establish that persons must reasonably be supposed to contemplate those consequences of their acts which will arise naturally, according to the usual course of things, or as it has been expressed (o), are normal, or likely or probable of occurrence in the ordinary course of things (p). Thus,

(n) This statement of the law has been approved on numerous occasions and in all Courts. Among recent instances may be mentioned the following in the House of Lords: *Hall v. Pim* (1928), 33 Com. Cas. 324; *Clayton & Waller, Ltd. v. Oliver*, [1930] A. C. 209; *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A. C. 452, 474.

(o) *Per Grove, J.*, in *Smith v. Green* (1875), 1 C. P. D. 92, 96.

(p) Even if the equivalence of the clauses in question were doubtful the doubt would be resolved by the sentence following next after the secondly quoted clause; for in this sentence the amount of injury which would ordinarily follow from a

in *Hobbs v. London and South Western Ry.* (q), Archibald, J., remarks: "In the case of breach of contract, the party breaking the contract must be held liable for the proximate and probable consequences of such breach, that is, such as might have been fairly in the contemplation of the parties at the time the contract was entered into".

Special Circumstances. Of course, what would be the natural consequences of a breach of contract in ordinary and normal circumstances might not be such a consequence in abnormal and exceptional circumstances. Therefore the Court proceeds in the quoted passage to point out that to ascertain the extent of liability for a particular breach where at the time of making the contract there existed, to the knowledge of the parties, abnormal and exceptional circumstances, one must inquire what would be the consequences reasonably to be anticipated as likely to result from such a breach in view of those special circumstances. The consequences which would thus be anticipated must be taken to have been contemplated by the parties.

In the result it appears that liability for breach of contract is limited to damages sufficient to compensate the injured party for such damage as, in view of the nature of the contract and the special circumstances (if any) known to both parties, might reasonably have been anticipated as likely to result from such a breach as has been committed, which damage must be taken to have been in the parties' contemplation. As was said by Bowen, L.J. (r), "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley v. Baxendale*" (s).

breach of contract under special circumstances is plainly equiparated with "damages which they [the parties knowing of such special circumstances] would reasonably contemplate". Cf. Pollock & Mulla, *Indian Contract Act* (2nd ed.), 312; and Lord Birkenhead (then F. E. Smith), in 16 L. Q. R. 276 ff.

(q) (1875), L. R. 10 Q. B. 111, 124; see also *per* Cockburn, C.J., 117.

(r) *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. D. 85, 92.

(s) Cf. *per* Viscount Sankey, L.C., in *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A. C. 452, 475. It has sometimes been urged by way of adverse criticism of the rule in *Hadley v. Baxendale* that people when they make a contract do not contemplate its breach. *McMahon v. Field* (1881), 7 Q. B. D. 591, 597. This criticism, however, did not deter the House of Lords in the *Banco de Portugal* Case from accepting *Hadley v. Baxendale*. See *per* Viscount Sankey, *ubi supra*. See also Chalmers, *Sale of Goods* (10th ed.), 135, and Pollock & Mulla, *Indian Contract Act* (2nd ed.), 313.

Notice of Special Circumstances. It is sometimes said that "bare notice" (t) of special circumstances given by the plaintiff to the defendant at the time of the making of the contract or "mere knowledge" (u) of such circumstances at that time is not enough to make the defendant liable for damage resulting from a breach by reason of those circumstances. What is necessary in addition, it is said, is that the defendant should have contracted on the basis of assuming liability for such damage. There appears to be no case, however, in which a failure to satisfy this supposed further requirement has been adopted as the ground for disallowing a head of damages (x), and it is both inconsistent with the judgment in *Hadley v. Baxendale*, and contrary to more recent authority (y). In *Hadley v. Baxendale* all that is stated to be necessary is that the special circumstances should be "communicated by the plaintiffs to the defendants, and thus known to both parties". If that were done, then without more, "the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated". With this is contrasted not the case where the defendant did not contract on the terms of being liable for abnormal damage but the case where the special circumstances were "wholly unknown" to him; and it is explained that he is not in that case liable for the abnormal damage, because had the special circumstances been brought to his knowledge the plaintiff and he might have provided specially as to the matter. *Hadley v. Baxendale*, therefore, establishes that liability for damage naturally resulting from known abnormal circumstances exists unless it is expressly excluded, not that there should be no liability unless expressly assumed.

Questions of Fact and Law. In the application of the principle of *Hadley v. Baxendale*, whether to the knowledge of the parties at the time of making the contract the case was characterised by special circumstances is a question of fact to be decided by the jury

(t) Salter, J, in *Patrick v. Russo-British Grain Export Co*, [1927] 2 K. B. 535, 540.

(u) 2 Sm. L. C. (13th ed.), 548.

(x) Cf. *per* Blackburn, J., in *Elbinger A.-G. v. Armstrong* (1874), L. R. 9 Q. B. 468, 478.

(y) *Hydraulic Engineering Co. v. McHaffie* (1874), 4 Q. B. D. 670, 674, 676, 677; *Hammond v. Bussey* (1887), 20 Q. B. D. 79, 97; *Agius v. Great Western Colliery Co*, [1899] 1 Q. B. 413; Pollock & Mulla, *Indian Contract Act* (2nd ed.), 313.

if there is one. What consequences the parties, taking into account such special circumstances (if any), should reasonably have contemplated as likely to flow from the breach is a question of law for the Judge (z).

Duty to Mitigate Damage. Damage, even though within the limits indicated by the principle of *Hadley v. Baxendale*, is nevertheless not to be regarded as resulting from the breach and therefore chargeable to the defaulting party if the other party by taking reasonable steps to that end could have averted it. The plaintiff is under a duty to the defendant to make all reasonable efforts to mitigate his damage (a). The plaintiff's impecuniosity will not excuse any failure to perform this duty. Notwithstanding that his failure to mitigate his loss was due to his lack of means, the damages recoverable by him will not include compensation for any loss which might reasonably have been avoided by him if he had possessed sufficient means (b).

Illustration. The foregoing principles may be illustrated by reference to the case where a contract for the sale of goods is broken by the seller wholly failing to deliver the goods. In such a case the measure of damages will ordinarily be the difference between the price and the value of the goods as at the date when delivery should have been effected. If there is an available market the market price at that date is to be taken as the value (c). Even if the buyer has in his turn contracted to resell at an enhanced price and when the breach occurs can no longer obtain other similar goods with which to perform his sub-contract he will not ordinarily be able to recover his loss of profit and any damages awarded against him at the suit of the sub-buyer, for this damage is not regarded as such as in the absence of special circumstances the vendor might reasonably have contemplated as likely to result from his breach of contract. If, however, the vendor knew when making the contract that the goods were being bought for resale he will ordinarily be liable to compensate his purchaser for loss of profit on the resale (d) and for any damages the purchaser may have to pay to the sub-purchaser for breach of the sub-contract (e). Nevertheless, if in such a case there

(z) *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K. B. 535, 538.

(a) *Payzu, Ltd. v. Saunders*, [1919] 2 K. B. 581.

(b) *Liesbosch Dredger v. S.S. Edison*, [1933] A. C. 449; Lord Wright, *Legal Essays and Addresses*, pp. 112 ff

(c) S. 51, Sale of Goods Act, 1893.

(d) *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K. B. 535.

(e) *Hall v. Pim* (1928), 33 Com. Cas. 324.

is an available market in which the buyer may obtain similar goods with which to fulfil his sub-contract his right to recover anything in respect of the sub-sale is generally excluded (f). In such a case the natural and ordinary result to be anticipated if the seller fails to deliver at the due date is that the buyer will go into the market and purchase equivalent goods at the prices then ruling (g).

Remoteness of Damage in Tort. It remains to notice the relation between the rules as to remoteness of damage in contract and the corresponding rules in tort. It is often asserted that the rules are the same in both cases. Before the decision in *Re Polemis and Furness, Withy & Co.* (h) it did indeed seem that the test as to remoteness in contract and as to unintended (i) consequences in tort was the same. In effect the rule in *Hadley v. Baxendale* is that the defendant is liable for all those consequences which as a reasonable man he should have foreseen (when entering into the contract) as the natural and probable result of the breach of contract. And before *Re Polemis* there was much authority for the view that the complete statement of the rule as to remoteness of damage in tort with respect to unintended consequences of the tort was that the defendant was liable for all those consequences which as a reasonable man he should have foreseen as the natural and probable result of his tort (k). That is to say, in both cases the limit of liability was to be determined by the test of what a reasonable man in the position and with knowledge of the defendant would have foreseen at the relevant time. The main point of difference was that in tort the matter was to be judged as at the time when the tort was committed, whereas in contract it was to be determined not as at the time of the breach of contract but as at the time when the contract was made.

Since the decision in *Re Polemis*, however, the view that the natural and probable test was the sole touchstone of remoteness in regard to unintended consequences in tort must, it would seem,

(f) *Williams v. Agius*, [1914] A. C. 510; *Patrick v. Russo-British Grain Export Co.*, *supra*, 541. As to whether there is any conflict between these authorities and *Hall v. Pim*, *supra*, see *James Finlay & Co. v. N. V. Kwik Hoo Tong H. M.*, [1929] 1 K. B. 400.

(g) For further illustrations of the rule in *Hadley v. Baxendale*, see 2 Sm. L. C. (13th ed.), pp. 543-575.

(h) [1921] 3 K. B. 560.

(i) A tortfeasor is liable for intended consequences no matter how apparently remote. Salmond, *Torts* (10th ed.), 133. There appears to be no corresponding rule in contract.

(k) Salmond, *Torts* (5th ed.), 131; (6th ed.), 138.

be regarded as erroneous. It now appears that in addition to the natural and probable test (not in substitution for it (l)) another test, *viz.*, that of directness, must be recognised, and that if damage is either the natural and probable or the direct consequence of a tort it will not be too remote (m). It seems clear that the principle of *Re Polemis* has no application to contract (n).

The present position therefore appears to be that the natural and probable test applies in both contract and tort (o) (p); but in the case of tort (but not contract) damage which would not pass this test may yet not be too remote if it satisfies the directness test recognised in, if not established by, *Re Polemis* (q).

§ 205. Debt

The breach of a contract to pay a liquidated sum of money is sometimes remedied by the award of damages ascertained on the principle of *Hadley v. Baxendale*. More frequently, however, the remedy is not damages assessed on this principle but debt (*i.e.*, a judgment for the very sum which was promised). As an incident of a claim in debt, damages, being either nominal or substantial in the shape of interest according to the circumstances, may sometimes be awarded in respect of the breach of contract constituted by the failure to pay on time (r).

When, then, is the remedy for failure to perform a contract to pay a liquidated sum of money in damages only and when in debt?

(l) *Haynes v. Harwood*, [1935] 1 K. B. 146.

(m) *Domine v. Grimsdall*, [1937] 2 A. E. R. 119, 124-5. In *Bourhill v. Young*, [1943] A. C. 92, in which the validity of the directness test did not in fact arise, Lords Thankerton (pp. 99-100), Macmillan (p. 106), and Porter (p. 113) saw fit expressly to reserve their opinions on that matter; Lord Russell of Killowen (p. 101) mentioned only the natural and probable test; Lord Wright alone approved of the directness test (p. 110).

(n) *McNair*, *This Polemis Business*, 4 Camb. L. J., 125; see also 48 L. Q. R. 104-5.

(o) In *Haynes v. Harwood*, *supra*, a tort case, the test was stated on the authority of *Hadley v. Baxendale* itself (p. 156).

(p) Accordingly where the property in goods had passed to the buyer by virtue of a contract of sale under which delivery of the goods and payment of the price were concurrent conditions and the seller then refused to deliver the goods, the buyer was held entitled to the same damages whether he recovered in contract or in tort (for conversion or detinue). *Cohen v. Roche*, [1927] 1 K. B. 169, 180.

(q) See also Salmond, *Torts* (9th ed.), 162.

(r) As to the distinction between debt and damages see Stephen's *Commentaries* (16th ed.), vol. 2, 255; Mayne, *Damages* (10th ed.), 257 ff.; *Tetley v. Wanless* (1867), L. R. 2 Ex. 275; *Ash v. Poupperville* (1867), L. R. 3 Q. B. 86; *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271; *South African Territories v. Wallington*, [1898] A. C. 309; *Société des Hôtels le Touquet Paris-Plage v. Cummings*, [1922] 1 K. B. 451; *Graumann v. Treitel*, [1940] 2 A. E. R. 188.

The answer appears to be that the remedy is in debt whenever the promise to pay is unconditional and is not a promise to pay by way of loan. When the promise to pay is conditional or is to advance money as a loan (s) the remedy is exclusively in damages.

Contract for the Sale of Land. The position where the promise is to pay otherwise than by way of loan may be illustrated by reference to the case of the sale and purchase of land. *Prima facie* payment of the price and conveyance of the land are concurrent conditions (t). Upon the purchaser's paying the price he is entitled to receive a conveyance; and for the Court to adjudge that the purchaser should pay otherwise than on this condition would be to give the vendor more than the contract entitles him to. But the remedy of debt is a common law remedy and the common law Courts would not enter a conditional judgment that the purchaser should pay only if the vendor should tender a conveyance (u). *Prima facie*, therefore, the vendor's remedy on common law principles is not debt but damages either nominal or assessed on the principle of *Hadley v. Baxendale*. If the vendor desires that the contract shall go through in accordance with its terms he must sue for the equitable remedy of specific performance. That is, he must ask the Court to attend to the performance of the contract as a whole, not merely to compel the performance of one of the purchaser's obligations under it. Where, however, it appears that payment of the purchase price or instalments thereof is not to be conditional upon the tender of a conveyance, the position is otherwise and the vendor can sue for the money as a debt at common law. "As a general rule", said Sir John Salmond in one of his judgments (x), "on the failure or refusal of a purchaser to complete an executory contract for the purchase of land the vendor is not entitled to sue for the purchase-money as a debt. He is entitled merely to sue for specific performance or for damages for the loss of his bargain. It is only when the contract has been completed by the execution and acceptance of a conveyance that unpaid purchase-money may become a debt and can be recovered accordingly. This general rule is sufficiently illustrated and established by the case of

(s) As to the statutory exception in the case of a contract with a company to take up its debentures see p 596, n. (y), *post*

(t) Dart, *Vendors and Purchasers* (7th ed.), 1004.

(u) Consider *Laird v. Pim* (1841), 7 M. & W. 474; 151 E. R. 852. Cf. *Deeks v. Strutt* (1794), 5 T. R. 690, 693; 101 E. R. 384, 385, *per* Ashhurst, J.

(x) *Ruddenklau v. Charlesworth*, [1925] N. Z. L. R. 161, 164; affirmed in New Zealand Court of Appeal, *ib.* 171

Laird v. Pim (y). The sale of land is in this respect similar to the sale of goods. In the case of goods sold and delivered, and of goods bargained and sold, the property in each case having passed to the buyer, the seller's remedy is to sue for the price. But if under any executory contract the buyer wrongfully refuses to accept the goods the seller's only remedy is an action for damages. The general rule, however, that in an executory contract for the sale of land the vendor cannot sue for the price is excluded whenever a contrary intention is shown by the express terms of the contract. And it seems established by authority that a contrary intention is sufficiently shown in all cases in which by the express terms of the contract the purchase-money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance. In all such cases the purchase-money or such part thereof becomes, on the day so fixed for its payment, a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been executed and notwithstanding the fact that the purchaser may have repudiated his contract. Notwithstanding such repudiation the vendor is not bound to sue for damages or specific performance, but may recover the agreed purchase-money. This rule is illustrated by such cases as *Pordage v. Cole* (z), *Mattock v. Kinglake* (a), *Dicker v. Jackson* (b), *Sibthorp v. Brunel* (c), *Wilks v. Smith* (d), and *Yates v. Gardiner* (e). In the last of these cases by a memorandum of agreement in the year 1843 it was witnessed that the plaintiff agreed to sell to the defendant a certain piece of land. The agreement then proceeded thus: 'And the said H. G. [the purchaser] hereby agrees to pay the said purchase-money on January 1, 1845, and to pay interest on the said purchase-money from January 1 next'. The agreement then stated that the plaintiff agreed to deliver to the defendant, within fourteen days after demand, an abstract of his title, and upon payment of the purchase-money to convey the land to the defendant. After the due date so agreed upon the vendor sued the purchaser for the purchase-money, and was held entitled to recover it as a debt, although no conveyance had been executed or tendered. Parke, B., says: '*Laird v. Pim* (f) differed from this case: there the payment was

(y) (1841), 7 M. & W. 474; 151 E. R. 852.
(z) (1669), 1 Wms. Saund. 319; 85 E. R. 449.
(a) (1839), 10 A. & E. 50; 113 E. R. 19.
(b) (1848), 6 C. B. 103; 136 E. R. 1190.
(c) (1849), 3 Ex. 826; 154 E. R. 1079.
(d) (1842), 10 M. & W. 355; 152 E. R. 507.
(e) (1851), 20 L. J. Ex. 327.
(f) (1841), 7 M. & W. 474; 151 E. R. 852.

to be made on the completion of the conveyance; here, by the terms of the agreement, the defendant was bound to pay the purchase-money on January 1 without any conveyance at all'. It seems clear from these authorities, that, notwithstanding the general rule to the effect that the only remedy of a vendor is damages or specific performance, he can recover as a debt all instalments of purchase-money payable prior to the due date of the balance of the purchase-money, and that he can similarly recover the balance itself on its due date, unless by the express terms of the contract or by necessary implication from these terms the completion of the contract by conveyance is made a condition concurrent of the payment of that balance" (g).

Contract to Lend Money. A promise to advance money by way of loan, even though unconditional, does not create a debt (h). For the breach of contract constituted by failure to make the advance, however, damages may be recovered, and these may be nominal or substantial according to the circumstances (i). If substantial they will be assessed on the principle of *Hadley v. Baxendale* (k).

Interest as Damages for Non-payment of Debt. It remains to consider the award of damages as an incident of a claim in debt. In general damages for the breach of contract constituted by the non-payment of the debt on due date are at common law nominal only (l). Exceptionally such damages may be substantial but in

(g) This passage was quoted with approval in the High Court of Australia in *McDonald v. Dennys Lascelles, Ltd.* (1933), 48 C. L. R. 457, 475; see also *Stockholms Bank v. Schering, Ltd.*, [1941] 1 K. B. 424, 435-6, 439.

(h) *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271, 277; *South African Territories v. Wallington*, [1897] 1 Q. B. 692, 695; [1898] A. C. 309.

(i) *Western Wagon and Property Co. v. West*, *ubi supra*; *South African Territories v. Wallington*, [1898] A. C. 309.

(k) *South African Territories v. Wallington*, [1897] 1 Q. B. at 696.

(l) *Wilde v. Clarkson* (1795), 6 T. R. 303; 101 E. R. 566; *Nosotti v. Page* (1851), 10 C. B. 643; 138 E. R. 255. See *Washington, Damages in Contract at Common Law*, 47 L. Q. R. at pp. 366-369. If payment of an overdue debt should be made before an action for its recovery is commenced the payment is deemed to be in complete satisfaction of both the debt and nominal damages for the failure to pay on time. see p. 497, *ante*. If, however, neither payment nor tender is made before action commenced, tender thereafter of the bare amount of the debt will not amount to tender of complete performance and acceptance of that amount by the creditor will not be presumed to be in satisfaction of his right to nominal damages. *Société des Hôtels le Touquet Paris-Plage v. Cummings*, [1922] 1 K. B. 451. As to whether a plaintiff suing for debt who accepts payment of the amount of both the debt and costs to the date of payment can continue his action and recover nominal damages see *Randall v. Moon* (1852), 12 C. B. 261, 266; 138 E. R. 904, 906; *Bullen and Leake, Pleadings* (3rd ed.), 663.

that case they take the form of interest and are not at large to be assessed on the principle of *Hadley v. Baxendale*. At common law debts do not generally carry interest (*m*). Interest may be claimed, however, where the debtor has expressly contracted to pay it, as well as in some other cases (*n*). To the extent that interest accrues pursuant to contract it may be recovered as a debt upon its becoming payable. In other cases where interest is recoverable at common law it is awarded by way of damages for the detention of the debt and is not itself a debt (*o*). The jurisdiction of the Court to allow interest by way of damages has recently been extended by the Legislature, section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, providing as follows: "In any proceedings tried in any Court of record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section—(a) shall authorise the giving of interest upon interest; or (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

§ 206. Specific Performance and Injunction

The only contractual obligations specifically enforced at common law are those constituting debts. All others are enforced by the common law not *in specie* but by being transformed into judgment debts constituted by the assessment and award of damages. In the generality of cases specific enforcement of non-pecuniary obligations is neither necessary nor expedient and the common law remedy of damages sufficiently satisfies the requirements of justice. In certain comparatively narrow classes of case, however, Courts of equity have taken a different view, and on the ground that the common law remedy of damages is inadequate in the particular circumstances have offered as a supplementary remedy the enforcement of con-

(*m*) *London, Chatham and Dover Ry. v. South Eastern Ry.*, [1893] A. C. 429.

(*n*) What those cases are is a matter of some uncertainty. Compare *London, Chatham and Dover Ry. v. South Eastern Ry.*, *supra*, and *Cook v. Fowler* (1874), L. R. 7 H. L. 27. See Halsbury, *Laws of England* (2nd ed.), vol. 23, p. 175, n. (c). In view of s. 3, Law Reform (Miscellaneous Provisions) Act, 1934, this uncertainty in the common law may not soon be removed.

(*o*) *Keene v. Keene* (1857), 3 C. B. (N.S.) 144; 140 E. R. 694; *London, Chatham and Dover Ry. v. South Eastern Ry.*, *supra*.

tractual obligations *in specie*. This equitable enforcement *in specie* may be either by way of specific performance or of injunction.

Both specific performance and injunction are discretionary remedies. A claim for damages is a claim of right, but a claim for specific performance or an injunction may be granted or refused by the Court in the exercise of its judicial discretion. While the Courts have laid down general rules as to the exercise of this discretion in different kinds of case they reserve an overriding discretion to depart from those rules if the conduct of the parties or the special circumstances of the particular case should require such a course in the interests of justice (*p*).

§ 207. Specific Performance

Etymologically specific performance and enforcement *in specie* have the same meaning and specific performance is sometimes used loosely to cover all forms of equitable enforcement *in specie*. Strictly and technically, however, specific performance means the enforcement *in specie* of a contract to do some positive act, such as conveying land or erecting or maintaining works.

It is, indeed, sometimes said (*q*), on the authority of a passage in one of Lord Selborne's judgments (*r*), that specific performance *stricto sensu* is confined to cases of executory contracts, meaning thereby contracts which are to be performed by the execution by one or both parties of an instrument or instruments. This view, it is submitted, is based on an inadequate appreciation of the passage in question. This passage is in part as follows: ". . . I cannot help observing that there is some fallacy and ambiguity in the way in which in cases of this kind those words 'specific performance' are very frequently used. There is a class of suits in this Court, known as suits for specific performance of executory agreements, which agreements are not intended between the parties to be the final instruments regulating their mutual relations under their contracts. We call those executory contracts as distinct from executed contracts: and we call those contracts 'executed', in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for

(*p*) *Goring v. Nash* (1744), 3 Atk. 186, 188; 26 E. R. 909, 910; *Buckle v. Mitchell* (1812), 18 Ves. 100, 111; 34 E. R. 255, 259; *Doherty v. Allman* (1878), 3 App. Cas. 709, 720-1, 728-30.

(*q*) *E.g.*, Fry, *Specific Performance* (6th ed.), ss. 38, 39.

(*r*) *Wolverhampton and Walsall Ry. v. London and North-Western Ry.* (1873), L. R. 16 Eq. 433, 438. See also *Tailby v. Official Receiver* (1888), 13 App. Cas. at 547; *Re Cary-Elwes' Contract*, [1906] 2 Ch. at 149.

General Principles. The general principles regulating the granting or refusal of specific performance are as follows:—

1. There must be a valid and enforceable contract at law. “Where no action at law will lie to recover damages, there this Court will not execute the agreement *in specie*, for equity will never make that a good agreement which is not good by law” (t). To this general rule the equitable doctrines of fraud and part performance in relation to section 4 of the Statute of Frauds and section 40 of the Law of Property Act, 1925, and the doctrine of part performance in relation to contracts entered into by corporations (u) constitute important and probably the only exceptions.

2. Specific performance will not be granted if damages will be an adequate remedy (x). Damages will be regarded as inadequate where the subject-matter of the contract is not of a usual or ordinary kind readily procurable from persons other than the promisor. On this principle equity will not grant specific performance of a contract to advance money by way of loan (y), or of a contract for the sale and purchase of Government stock (z), or of shares freely available in the market (a). On the other hand specific performance of contracts for the acquisition of interests in land is granted almost as of course (b). A piece of land must always be unique in at least one respect, *viz.*, its location, and generally in other respects as well, and damages are not therefore regarded by equity as an adequate substitute for the land (c). These considerations do not, however, explain why specific performance may be had just as readily by a vendor as a purchaser. One explanation which has been offered is that as equity aided purchasers it was constrained to aid vendors by its principle that “remedies should be mutual” (d). For

(t) *Marquis of Normanby v. Duke of Devonshire* (1697), 2 Freem. Ch. 217, 218; 22 E. R. 1169.

(u) See p. 143, *ante*

(x) *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 610; 57 E. R. 239, 240.

(y) *Rogers v. Challis* (1859), 27 Beav. 175; 54 E. R. 68; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271, 275; *South African Territories, Ltd. v. Wallington*, [1898] A. C. 309, 318. A statutory exception is constituted by s. 76 of the Companies Act, 1929: “A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance”.

(z) *Cud v. Rutter* (1719), 1 P. Wms. 570; 24 E. R. 521; 2 Wh. & T. L. C. (9th ed.), 368.

(a) *Re Schwabacher* (1908), 98 L. T. 127, 128.

(b) *Hall v. Warren* (1804), 9 Ves. 605, 608; 32 E. R. 738, 739.

(c) *Cuddee v. Rutter* as reported in 5 Vin. Abr. 538, pl. 21; 2 Wh. & T. L. C. (9th ed.), 368, 371; *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 610; 57 E. R. 239, 240.

(d) Maitland, *Equity* (1st ed.), 239; *Adderley v. Dixon*, *supra*, at 612; E. R. 241. Cf. Fry, *Specific Performance* (6th ed.), p. 33, s. 72.

similar reasons both vendor and purchaser may have specific performance of a contract for the sale of shares in a company if such shares are not readily available in the market (e).

With respect to contracts for the sale and purchase of chattels it appears that apart from statute equity interfered only (f) where the chattel was unique (g) or had for the plaintiff a special and peculiar value (h). The matter does not now turn solely on non-statutory law, however, for section 52 of the Sale of Goods Act, 1893, provides as follows: "In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree" (i). In *Cohen v. Roche* (k), McCardie, J., did not think that this provision justified granting at the suit of a purchaser specific performance of a contract for the sale and purchase of some "ordinary articles of commerce [a set of eight Hepplewhite chairs] . . . of no special value or interest", bought for adding to the purchaser's stock-in-trade and reselling at a profit, but without any special customer in view. In *Behnke v. Bede Shipping Co.* (l), Wright, J., proceeding under the section, decreed specific performance of a contract for the sale and purchase of a steamer. It has been pointed out that the section applies in terms only to the case of a purchaser seeking specific performance (m). Whether on purely equitable principles specific performance of a contract for the sale of chattels would be decreed at the suit of a vendor appears doubtful (m).

It has sometimes been contended that damages are not an adequate remedy where the assessment of them is attended with great uncertainty. On this ground Leach, V.-C., in *Adderley v.*

(e) *Duncuft v. Albrecht* (1841), 12 Sim 189; 59 E. R. 1104

(f) See, however, *per* Lord Westbury in *Holroyd v. Marshall* (1862), 10 H. L. C. 191, 209-10; 11 E. R. 999, 1006. Cf. Fry, *Specific Performance* (6th ed.), p. 38, s. 82

(g) *Falcke v. Gray* (1859), 4 Drew. 651; 62 E. R. 250

(h) Cf. *Legg v. Mathieson* (1860), 2 Giff. 71; 66 E. R. 31

(i) As to whether this enactment altered the law as previously understood see *Re Wat*, [1927] 1 Ch. 606, 617, 630.

(k) [1927] 1 K. B. 169.

(l) [1927] 1 K. B. 649.

(m) Fry, *Specific Performance* (6th ed.), p. 39, s. 83.

Dixon (n) decreed the specific performance of a contract for the sale and purchase of certain debts which had been proved in a bankruptcy. Lord Hardwicke appears to have thought that on the same principle specific performance might be decreed of a contract for the sale and purchase of goods in instalments, inasmuch as the assessment of damages in respect of future instalments would be highly speculative (o). Modern authority is opposed to this application of the principle, however (p).

3. Specific performance will not be granted of a contract the performance of which cannot be accomplished *uno flatu* but will continue over a period of time, so that continuous supervision would be necessary to secure such performance (q). On this principle specific performance of a contract to build, repair or maintain works or buildings is not commonly granted (r).

4. Specific performance will not be granted of a contract to enter into or continue a personal relationship such as that of master and servant (s). This rule is based partly on the impossibility of supervision by the Court (t) and partly upon considerations of public policy (u).

5. Specific performance will be refused if the defendant, upon obeying the Court's order, would be entitled immediately to avoid

(n) (1823), 1 Sim & St. 607; 57 E. R. 239.

(o) *Buxton v. Lister* (1746), 3 Atk. 383, 384; 26 E. R. 1020, 1021.

(p) *Pollard v. Clayton* (1855), 1 K. & J. 462; 69 E. R. 540; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A. C. 293, 361.

(q) *De Mattos v. Gibson* (1859), 4 De G. & J. 276, 297; 45 E. R. 108, 115; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry.* (1874), L. R. 9 Ch. 359; *Ryan v. Mutual Tontine Westminster Chambers Assn.*, [1893] 1 Ch. 116.

(r) *Ryan v. Mutual Tontine Westminster Chambers Assn.*, at p. 128; *Kennard v. Cory Bros. & Co.*, [1922] 2 Ch. 1, 12-13. There are some earlier authorities to the contrary: *Mosely v. Virgin* (1796), 3 Ves. Jun. 184, 185; 30 E. R. 959; *Lane v. Newdigate* (1804), 10 Ves. 192; 32 E. R. 818. In *Jones v. Parker* (1895), 163 Mass. Reports, 564, the Supreme Judicial Court of Massachusetts, *per* Holmes, J., readily granted specific performance of a contract which involved the installation of heating and lighting apparatus sufficient "reasonably to heat and light" certain premises. To the general rule against specific performance in such cases modern English authority admits an exception where the works are reasonably defined, the plaintiff has a substantial interest in the performance of the contract of such a nature as cannot be adequately met by an award of damages, and the land on which the works are to be erected is in the possession of the defendant or (possibly) the defendant otherwise than in virtue of possession of the land has it in his power to erect the works: *Wolverhampton Corp. v. Emmons*, [1901] 1 K. B. 515; *Molyneux v. Richard*, [1906] 1 Ch. 34; *Carpenters' Estates, Ltd. v. Davies*, [1940] Ch. 160.

(s) *Frith v. Frith*, [1906] A. C. 254, 261.

(t) *Wolverhampton & Walsall Ry. v. London & North Western Ry.* (1873), L. R. 16 Eq. 433, 439 (quoted p. 594, *ante*).

(u) *Johnston v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914, 926; 43 E. R. 358, 362; *De Francesco v. Barnum* (1890), 45 Ch. D. 426, 438.

or undo his performance. Equity, it is said, does nothing in vain. Hence specific performance will not be decreed of a contract for a lease where the plaintiff tenant has already committed such acts as would entitle the lessor to forfeit the lease when granted (x).

6. When the performance of the contract by the defendant is conditional upon performance by the plaintiff the Court will not specifically enforce the contract at the plaintiff's suit unless he has already performed his part or the Court can compel him immediately to do so (y). Where the plaintiff's performance appears not to have been a condition of the defendant's performance, however, the plaintiff may specifically enforce the defendant's obligation notwithstanding that he himself cannot yet be compelled to perform his side, or in some circumstances notwithstanding that he himself may be in default in respect of his own performance (z).

7. It is sometimes said that as a condition of the granting of specific performance not only must the Court be able to enforce both sides of the contract to the extent stated in paragraph 6, but in addition such enforcement should have been possible when the contract was entered into (a). Remedies, as it is expressed, should be mutual. It has been powerfully contended (b), however, that want of mutuality at the time when the contract is entered into is not of importance and that the cases commonly cited in support of the doctrine are readily explicable on other grounds. Certainly it is not easy to find any entirely satisfactory authority for this supposed requirement of what may be called initial mutuality. The case of *Flight v. Bolland* (c), before Sir John Leach, M.R., in which an infant plaintiff was refused specific performance is sometimes thought to be an authentic application of the doctrine. It is to be observed, however, that in that case the plaintiff was still an infant at the time of the suit. The case was therefore not one in which an initial lack of mutuality had since disappeared. In the earlier case of *Clayton v. Ashdown* (d) an infant had agreed to lease a farm to the defendant. After coming of age the infant sold the farm, and the defendant having abandoned the premises, the purchaser insti-

(x) *Gregory v. Wilson* (1852), 9 Ha. 683, 687; 68 E. R. 687, 689; *Swain v. Ayres* (1888), 21 Ch D. 289.

(y) *Ogden v. Fossick* (1862), 4 De G. F. & J. 426, 45 E. R. 1249.

(z) *Willinson v. Clements* (1872), L. R. 8 Ch 96; *Lowther v. Heaver* (1889), 41 Ch D. 248.

(a) Fry, *Specific Performance* (6th ed.), p. 219, s 460

(b) *Ashburner, Equity* (2nd ed.), 404-5; see also the notable essay by J. B. Ames, *Mutuality in Specific Performance*, 3 Col. L. Rev 1, reprinted in Ames, *Lectures on Legal History*, 370 ff.

(c) (1828), 4 Russ. 298; 38 E. R. 817

(d) (1714), 9 Vin. Abr. 393, G. 4, pl. 1; 2 Eq. Cas Abr. 516; 22 E. R. 435.

tuted a suit for specific performance of the contract for a lease. Notwithstanding the contention that there had been no initial mutuality Lord Harcourt, L.C., made a decree.

8. Specific performance will sometimes be refused on the ground that what is to be done has not been specified with such certainty as to admit of the Court enforcing it *in specie*. Thus specific performance would not be granted of a contract to build a house of a specified value but not otherwise described, even if apart from the uncertainty there were no impediment to the relief (e). Yet damages could be obtained at law if the contract were broken. In general, however, the same degree of certainty is necessary whether the plaintiff seeks damages or specific performance. As was said by Maugham, J., in a recent case (f), "if the Court . . . is unable to determine what the material terms of the contract are [in order specifically to enforce it], it is equally unable to say that there is a contract in relation to which damages can be assessed".

9. Equity will not assist a volunteer to enforce purely contractual rights and hence will not decree specific performance of a voluntary covenant at the suit of the covenantee (g); and even if the covenantor receives consideration from some person other than the covenantee this will not move equity to assist the covenantee. If, however, the person providing the consideration is also a covenantee and he seeks specific performance the Court will enforce the contract not only in his favour but in favour of the volunteer as well (h).

10. Exceptionally specific performance will sometimes be refused on the ground that to grant it would cause undue hardship to the defendant (i).

11. Lord Cairns' Act (k) conferred on the Court of Chancery jurisdiction, in all cases in which it might have entertained an application for specific performance, to award damages in substitution for such specific performance. The effect of later enactments has been to continue this jurisdiction in the High Court (l). It would appear from Lord Cairns' Act that the Legislature considered that the equitable rules as to the granting of specific performance, strict

(e) *Mosely v. Virgin* (1796), 3 Ves. Jun. 184; 30 E. R. 959.

(f) *Stimson v. Gray*, [1929] 1 Ch. 629, 646; see also *Waring & Gillow, Ltd. v. Thompson* (1912), 29 T. L. R. 154, 155-6.

(g) *Jefferys v. Jefferys* (1811), Ct. & Ph. 138; 41 E. R. 443.

(h) *Davenport v. Bishop* (1813), 2 Y. & C. C. C. 451; 63 E. R. 201; affirmed by L. C. 1 Ph. 698; 41 E. R. 798.

(i) *Mason v. Armitage* (1806), 13 Ves. 25; 33 E. R. 204; *Day v. Wells* (1861), 30 Beav. 220; 54 E. R. 872; cf. *Van Praagh v. Everidge*, [1902] 2 Ch. 266, 270-3.

(k) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2.

(l) N. (r), p. 601, *post*.

though they were, were yet in some cases not strict enough, so that cases might occur where specific performance could (apart from the statute) be had but where nevertheless it would be better that such relief should not be available (m). The question in what cases this would be so, however, still awaits an authoritative answer, and it would seem that this provision of Lord Cairns' Act has had but little effect in limiting the availability of specific performance.

Specific Performance with Damages or Compensation. In many cases where specific performance would ordinarily be granted, complete performance of the contract in accordance with its terms (even disregarding the term fixing the time for the defendant's performance, which time will almost invariably be past when the action is commenced (n)) will be impossible. What should be done in such cases as these? Of course the deficiency in performance may be so great as to amount to an essential breach. In that case the injured party may elect to rescind and claim damages (o). If, however, the breach is less extensive than this, or the injured party does not rescind, how does the matter stand? Equity might have said that in any case where complete performance was impossible it would leave the parties to their remedies at common law. As we shall presently see, this is, indeed, sometimes done by equity in exceptional cases; but ordinarily the Court will decree specific performance of what can be done and adjust the deficiency by an award of damages or by compensation.

The jurisdiction to award damages (ordinarily a common law remedy) as an incident of granting relief by way of specific performance was assumed by equity on the principle of preventing a multiplicity of suits (p). The jurisdiction was afterwards confirmed by Lord Cairns' Act (q), and later enactments have preserved it in the High Court (r). Where damages are awarded in the exercise of this jurisdiction they are measured on common law principles (s). Not only, however, did the Court of Chancery employ the common law instrument of damages in order that complete justice might be done where the principal relief granted was specific performance,

(m) See *Lavery v. Pursell* (1888), 39 Ch. D. 508, 519

(n) Fry, *Specific Performance* (6th ed.), p. 3, s. 3

(o) See p. 561, *ante*.

(p) Ashburner, *Equity* (2nd ed.), p. 43, and p. 427, n. (s), *ante*, *Phelps v. Prothero* (1855), 7 De G. M. & G. 722; 44 E. R. 280.

(q) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2.

(r) See *Leeds Industrial Co-op. Society, Ltd. v. Slack*, [1924] A. C. 851, 861-863; and s. 18 (2) (a) and (3) of the Supreme Court of Judicature Act, 1925.

(s) *Jones v. Gardiner*, [1902] 1 Ch. 191, 196.

but it also developed a purely equitable device for the same purpose, *viz.*, compensation. In a proper case equity will compel a defendant to perform as much of his contract as he is able and compensate the plaintiff for the deficiency by an abatement in the price. Conversely it may allow a plaintiff who cannot himself render complete performance to compel the defendant to take what is available, the plaintiff making compensation for the deficiency.

In many cases damages and compensation will produce the same result, and it will be unimportant to distinguish between them. Compensation, however, is limited to contracts for the acquisition of interests in land, and to deficiencies of estate, title or area (*t*) capable of ready assessment in money (*u*), and covers nothing in the nature of special damage (*x*). None of these limitations (*y*) applies to damages. On the other hand, compensation may sometimes be had where damages are not available. This happens because in the case of contracts for the acquisition of interests in land substantial damages at common law are often severely limited or entirely excluded by the rule in *Bain v. Fothergill* (*z*). By this rule a purchaser who has not lawfully rescinded the contract is precluded, in the absence of any express provision in the contract to the contrary, from recovering substantial damages in respect of any breach of the contract due to a defect in the vendor's title; and if he lawfully rescinds he is only entitled to the return of his deposit and instalments of purchase-money (if any) together with damages (*a*) limited to interest thereon and his expenses of investigating the title. Suppose, then, that A should contract to sell an area of a hundred acres of ordinary farming land to B for £1,000 and it should turn out that A has no title to five acres of the land. In an action by B for specific performance as far as it could be had it would be impossible to do justice by assessing damages against A for the deficiency and setting off the assessed amount against the purchase price, for such damages would be nominal only. In such a case, however, equity will often apply its own doctrine of compensation and do justice by requiring A to compensate to B by making a proportionate abatement of the purchase price.

(*t*) *Rutherford v. Acton-Adams*, [1915] A. C. 866, 870.

(*u*) *Rudd v. Lascelles*, [1900] 1 Ch. 815, 819.

(*x*) *Todd v. Gee* (1810), 17 Ves. 273, 278; 34 E. R. 106, 107.

(*y*) In the case of deficiency of title, however, as will immediately be seen, an even more drastic limitation applies in claims for damages.

(*z*) (1874), L. R. 7 H. L. 158; see also *Rowe v. School Board for London* (1887), 36 Ch. D. 619, and *Jones v. Gardiner*, [1902] 1 Ch. 191, 195

(*a*) *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546, 552.

Summary. The main rules resulting from the interaction of the several principles which we have mentioned may be stated as follows:—

1. If the deficiency in performance would amount to an essential breach the promisee can rescind and recover damages, which, subject to the rule in *Bain v. Fothergill*, may include damages for the loss of the bargain (b).

2. The promisee need not, however, rescind but may elect to affirm the contract (c). In that case he will be entitled to specific performance so far as the promisor can give it. He is also entitled to damages for the breach except to the extent that the recovery of such damages is excluded by the rule in *Bain v. Fothergill*. Alternatively, if the contract relates to land and the failure of complete performance is constituted by a deficiency of estate, title or area the value of which can be accurately estimated, the promisee (being the purchaser) will ordinarily be entitled (notwithstanding *Bain v. Fothergill*) to be compensated by an abatement of the purchase price (d). In certain exceptional cases, however, the Court considers that to require the vendor to make compensation would be to inflict an unreasonable degree of hardship on him, and it therefore leaves the purchaser with the option of accepting specific performance without compensation or rescinding the contract and taking such damages as he is entitled to on common law principles (e). Thus in *Earl of Durham v. Legard* (f) the plaintiff agreed to purchase an estate of the defendant for £66,000. It was described in the contract as the "Kidland Estate containing 21,750 acres". In the course of the investigation of the title it turned out that the Kidland Estate contained no more than 11,814 acres. The plaintiff sought specific performance with compensation. Sir John Romilly, M.R., refused to allow compensation, however, saying, "this is not a case in which the Court could, upon any principle, assess compensation so as to make everything fair between them [the parties] . . . if that principle were followed here, the plaintiff would get for less than £36,000 an estate the rental of which was accurately stated and which the defendant intended to sell for £66,000. It is, therefore, clear I should be doing great injustice if I applied that rule upon the present occasion".

(b) See p. 561, *ante*.

(c) See p. 559, *ante*.

(d) *Hughes v. Jones* (1861), 3 De G. F. & J. 307, 315; 45 E. R. 897, 900.

(e) *Rudd v. Lascelles*, [1900] 1 Ch. 815, 820, *Rutherford v. Acton-Adams*, [1915] A. C. 866, 870.

(f) (1865), 34 Beav. 611; 55 E. R. 771.

3. If the deficiency in the promisor's performance would not amount to an essential breach not only the promisee but also the promisor may obtain specific performance. The promisee is entitled to the relief on the terms indicated in paragraph 2. The promisor claiming specific performance is entitled to a decree on the condition that he pays (or where he is to receive a money consideration abates the same by the amount of) damages for the breach (*g*). If, however, the contract relates to the acquisition of an interest in land, then so far as *Bain v. Fothergill* may be applicable to disentitle the promisee (being the purchaser) to substantial damages the promisor must compensate him in respect of the deficiency by making a reasonable allowance in reduction of the price (*h*), or by paying him a reasonable sum (*i*).

4. It is not uncommon for contracts, especially those relating to land, to contain express provisions dealing with the subject-matters of the preceding paragraphs 1, 2 and 3. In so far as such provisions extend they will displace the common law or equitable rules which would be *prima facie* applicable.

§ 208. Injunction

A negative contractual obligation is enforced *in specie* by means of an injunction. An injunction is an order of a Court of equity directing a party to do some act which he is legally bound to do (other than the performance of an affirmative contractual obligation) or to abstain from the commission, continuance or repetition of some act which he is legally bound not to do. Thus while an agreement for sale and purchase of land is enforced *in specie* by a decree of specific performance a negative covenant in the conveyance executed pursuant to the decree will be enforced *in specie* by an injunction.

Injunctions are either prohibitory or mandatory. A prohibitory injunction requires the defendant to refrain from doing some positive

(*g*) *Phelps v. Prothero* (1855), 7 De G. M. & G. 722; 44 E. R. 280.

(*h*) *Rutherford v. Acton-Adams*, [1915] A. C. 866, 870.

(*i*) Query, however, whether the vendor is entitled to specific performance on the terms of an allowance being made by him by way of compensation or damages when the deficiency, while not amounting to an essential breach, is more than a "small and immaterial deficiency". *Rutherford v. Acton-Adams*, *supra*; *Re Arnold* (1880), 14 Ch. D. 270, 279-280, 283. Cf. *per* Lord Esher, M.R., in *Re Fawcett and Holmes* (1889), 42 Ch. D. at 157. If specific performance would be refused in such a case, the purchaser, although not able to rescind at common law, might be able to invoke s. 49 (2) of the Law of Property Act, 1925, as follows: "Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit." This provision was recently considered by the Court of Appeal in *James Macara, Ltd v. Barclay* (1944), 61 T. L. R. 78.

act, a mandatory injunction requires him to do such an act. A mandatory injunction is the proper remedy to secure the undoing of the results of an act done in breach of a negative promise and constituting a continuing breach thereof. A prohibitory injunction is the appropriate remedy for the enforcement of a negative promise in any other circumstances. Thus if a breach is threatened of a covenant not to build beyond a certain line the remedy would be a prohibitory injunction. If, on the other hand, a building has already been erected in breach of the covenant the remedy *in specie* (if any) will be a mandatory injunction.

The principles upon which the remedy of injunction is granted or withheld differ accordingly as the injunction sought is prohibitory or mandatory; and some special rules have been developed in regard to contracts for personal service. We shall first consider the general position and then notice the respects in which service contracts diverge from it. We must also consider the injunction in relation to damages.

Injunctions to Enforce Contracts not being Contracts of Service.

An original promisee is entitled as of course (*j*) to a prohibitory injunction to secure the performance of a negative promise which the promisor threatens (*k*) to break. Past breaches may be relevant to such an application as affording evidence of an intention to continue the commission of similar breaches in the future (*l*). Where the plaintiff is not the original promisee but one who has succeeded to the benefit of the covenant by acquiring property with which it runs it seems that the Court will exercise a freer discretion in the matter and refuse to grant an injunction unless the plaintiff can prove that substantial damage would result to him from the breach (*m*).

(*j*) *Doherty v. Allman* (1878), 3 App. Cas. 709, *per* Lord Cairns, L.C., 719: "If there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves".

(*k*) *Kernot v. Potter* (1862), 3 De G. F. & J. 447, 457; 45 E. R. 951, 956; *Proctor v. Bayley* (1889), 42 Ch. D. 390, 398 ff., 401.

(*l*) See cases cited in last note.

(*m*) *Kelly v. Barrett*, [1924] 2 Ch. 379, 396; *Achilli v. Tovell*, [1927] 2 Ch. 243.

Where the promisor has already broken his promise by doing something which constitutes a continuing breach of his promise, as, e.g., erecting a house contrary to a covenant not to do so, a mandatory injunction requiring that the offending thing be undone will sometimes be granted, but not so readily as a prohibitory injunction would have been if the offending act were still merely being threatened. A mandatory injunction will ordinarily be granted if the promisor committed the breach in disregard of the protests of the promisee, and in such a case it is no answer to the promisee that the continuance of the breach does not cause him any substantial harm (n). It would seem that the result would be the same even where the promisee did not protest at the time if he did not, on the other hand, stand by and acquiesce (o), and if what was done was plainly a breach of the promise or known by the promisor to be a breach. In other cases although there may have been no acquiescence an injunction will be refused if the damage resulting to the plaintiff from the breach is not substantial (p).

It is to be observed that a promise which is in form affirmative may sometimes be construed as in substance negative (q). Or, as it is often expressed, an affirmative promise will ordinarily be regarded as accompanied by an implied negative promise not to do anything which necessarily involves a breach of the express affirmative promise. Thus a contract by A with B to take from B all of a particular commodity which A shall purchase during a specified period necessarily involves by way of implication a promise by A not to purchase supplies of the commodity from any person other than B during that period and this negative promise will be enforced by injunction in a proper case (r). It appears, however, that implied negative promises are not enforced as of course, but that the Court will take into account considerations of convenience and the substantiality of the damage which would result from the breach (s).

The principle that equity will not assist a volunteer applies to

(n) *Att.-Gen. v. Mid-Kent Ry.* (1867), L. R. 3 Ch. 100; *Manners v. Johnson*, (1875), 1 Ch. D. 673; *Bickmore v. Dimmer*, [1903] 1 Ch. 158, 168.

(o) See Salmond, *Torts* (10th ed.), p. 167.

(p) *Bowes v. Law* (1870), L. R. 9 Eq. 636. See also *Sharp v. Harrison*, [1922] 1 Ch. 502, where Astbury, J., apparently went to some extent on the ground of acquiescence: see pp. 515-6.

(q) *Wolverhampton and Walsall Ry. v. London and North-Western Ry.* (1873), L. R. 16 Eq. 433, 440.

(r) *Catt v. Tourle* (1869), L. R. 4 Ch. 654; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799.

(s) *Doherty v. Allman* (1878), 3 App. Cas. 709, 720.

exclude the remedy of injunction in the case of a voluntary covenant (t).

Where the performance of a negative stipulation by the defendant is conditional upon some performance by the plaintiff the Court will not grant the plaintiff an injunction if he has not already performed his part or the Court cannot compel him immediately to do so (u).

A contractual obligation will not be enforced by injunction unless it is valid at law. Whether contracts which are not enforceable at law for failing to comply with section 4 of the Statute of Frauds or section 40 of the Law of Property Act, 1925, constitute an exception if there is part performance is doubtful. The question has been discussed in an earlier chapter (x) (y).

Injunctions to Enforce Service Contracts. In the case of contracts for personal service an injunction, the effect of which would be to continue in existence the relationship of master and servant, may be had much less readily than an injunction to enforce other kinds of contractual rights. Thus if there are no express negative promises by the parties not to do acts inconsistent with the relationship of master and servant created by the contract no such promises will be implied. In *Whitwood Chemical Co. v. Hardman* (z) the defendant had covenanted to devote the whole of his time to his employer's business, but there was no express negative covenant. The Court of Appeal refused to restrain the defendant from giving less than the whole of his time to the business (a). Moreover an injunction will be refused even if there is a promise negative in form if it is not also negative in substance. In such a case to grant an injunction would, in effect, be to decree specific performance of the contract to serve. On this principle an injunction will not be granted to enforce a promise by a master (b) or a servant (c) not to give notice terminating the employment before a particular date.

If there is in the contract of employment an express promise negative in substance as well as in form that the promisor will not

(t) *Doherty v. Allman* (1878), 3 App. Cas. 709, 720, quoted p. 605, n. (j), *ante*.

(u) *Hills v. Croll* (1842), 1 De G. M. & G. 627 (n.); 42 E. R. 698. Cf. p. 599, *ante*.

(x) See pp. 189, 190, *ante*.

(y) As to the case where a contract is void at law because being by a corporation, it is not sealed, see p. 143, *ante*.

(z) [1891] 2 Ch. 416.

(a) See also *Mortimer v. Beckett*, [1920] 1 Ch. 571.

(b) *Davis v. Foreman*, [1894] 3 Ch. 654.

(c) *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413.

do acts inconsistent with the employment that promise may (d) but, as against the servant, at any rate, will not necessarily be enforced by injunction. It will not be enforced by injunction against the servant if damages would be a sufficient remedy. Nor will it be so enforced if its practical effect would be to deprive the servant of all reasonable opportunity of earning his living save by continuing in the master's employment. In *Rely-a-Bell Burglar and Fire Alarm Co., Ltd. v. Eisler (e)*, the defendant entered the plaintiff's employment for a term of five years under an agreement which provided that during this term he should not enter into any other employment. During the currency of the term the defendant entered the employment of a competing company, but Russell, J., refused to restrain him by injunction from continuing in this new employment, saying: "If I were to restrain this man according to the terms of the covenant he would be forced to remain idle and starve" (f). With this case may be compared *Warner Brothers v. Nelson (g)*, a case in which the defendant, a well-known actress, entered into a contract to act for the plaintiffs for a period of fifty-two weeks, the engagement being renewable by the plaintiffs for succeeding periods of fifty-two weeks at increasing rates of salary. The contract contained a promise by the defendant not to render similar services to any other person during her engagement with the plaintiffs. Branson, J., considered that enjoining the defendant for a reasonable period in terms of this promise was not tantamount to leaving her the performance of her contract as the only practical alternative to remaining idle. "The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction" (h). In this same case Branson, J., also considered whether damages would be a sufficient remedy, and concluded that they would not. He took into account the difficulty of estimating them, and an admission by the defendant in the contract that her

(d) *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; 42 E. R. 687.

(e) [1926] Ch. 609.

(f) At p. 616.

(g) [1937] 1 K. B. 209.

(h) At p. 219.

services being "of a special unique extraordinary and intellectual character" (i) had a peculiar value which could not be adequately compensated in damages, and that a breach might "cost the producer [plaintiff] great and irreparable injury and damage" (i).

Injunction in Relation to Damages. By Lord Cairns' Act jurisdiction was conferred on the Court of Chancery, in all cases in which it might entertain an application for an injunction, to award damages "either in addition to or in substitution for such injunction". This jurisdiction has been continued by later statutes in the High Court (k).

In so far as the case is a proper one for an injunction, therefore, and damage has been suffered by the plaintiff in consequence of the failure of the defendant to carry out his contract in the past, the Court may do complete justice by awarding damages in respect of the past breach and granting an injunction for the future.

The jurisdiction to award damages in lieu of injunction, *i.e.*, in effect, to allow the promisor to purchase a release from his liability to perform his promise for the future, will be exercised only in the most exceptional circumstances. In general, where a breach of a negative promise causes substantial damage the Court has no discretion to compel the plaintiff to accept damages in lieu of an injunction (l); while where, because of the absence of substantial damage, the Court refuses an injunction to a plaintiff who is not an original promisee but succeeds to the promise in virtue of acquiring property with which it runs (m), the Court will not award even nominal damages in lieu of an injunction (n).

§ 209. Limitation of Actions and Lapse of Time

Until July 1, 1940 (o), the statutory law as to the operation of lapse of time in defeating an action on a contract was chiefly contained in the *Limitation Act, 1623* (p), and the *Civil Procedure Act, 1833* (q). These enactments were the subject of a considerable body of interpretative decisions and were supplemented by certain

(i) As to these admissions see note in 90 *American State Reports*, 634, 648-9; and Chaffee & Simpson, *Cases on Equity* (1934), vol. 1, pp. 469 ff.

(k) See p. 601, nn. (q) and (r), *ante*.

(l) *Achilli v. Towell*, [1927] 2 Ch. 243.

(m) See p. 605, *ante*.

(n) *Kelly v. Barrett*, [1924] 2 Ch. 379.

(o) S. 34 (2), *Limitation Act, 1939*.

(p) 21 Jac. 1, c. 16, ss. 3, 4 and 7.

(q) 3 & 4 Will. 4, c. 42, ss. 3-7.

rules of equity based on the same general policy as the statutory provisions. Recently this body of law was considered by the Law Revision Committee, and as a result of their labours (r) the earlier statutes have now been repealed and for them substituted the Limitation Act, 1939. This Act effected some valuable improvements in the law and settled a number of uncertain points. We shall consider first the law under the new statute, and secondly the special equitable rules as to the effect of lapse of time on a cause of action in contract.

Limitation Act, 1939. Subject to certain exceptions no action on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued in the case of a simple contract (s), or of twelve years from that date in the case of a deed (t). For the present purpose any claim by way of set-off or counter-claim is to be deemed a separate action commenced on the same date as the action in which the set-off or counter-claim is pleaded (u).

A cause of action accrues when all the facts have occurred which must be alleged and (unless admitted by the defendant) proved by the plaintiff if he is to succeed in his action (x). In actions based on breach of contract the cause of action is the breach (y), and not the actual damage (if any) resulting therefrom, for a breach of contract is actionable *per se* without proof of actual damage, nominal damages being recoverable in the absence of such proof. Even if resulting actual damage happens or is discovered after the occurrence of the breach it will not be a new cause of action but merely an incident of the old one (z). What in any particular case constitutes a breach of contract turns on a comparison of what was done or omitted with what on the true meaning and effect of the particular contract was at the relevant time required to be done or omitted. In other words the question turns on whether or not the defendant's acts or omissions fell short of the performance required of him by

(r) Report published as Cmd. 5334 (reprinted in [1937] W. N. p. 2).

(s) S. 2 (1), Limitation Act, 1939.

(t) S. 2 (3), *ib.* Under the Civil Procedure Act, 1833, the corresponding period was twenty years.

(u) S. 28, *ib.*

(x) *Coburn v. Colledge*, [1897] 1 Q. B. 702.

(y) As to the case of a debt payable on demand, however, see p. 480, *ante*.

(z) *Battley v. Faulkner* (1820), 3 B. & Ald. 288; 106 E. R. 668; *Howell v. Young* (1826), 5 B. & C. 259; 108 E. R. 97; Salmond, *Torts* (9th ed.), 179.

his contract. We have already sufficiently considered what conduct will constitute performance of a contract (a).

If, when the cause of action arises, the person to whom it accrues is an infant, or of unsound mind, or in certain cases a convict (b), the action may be brought before the expiration of six years from the date when the person ceases to be under the disability or dies, whichever event first occurs. No extension of time is allowed where the right of action first accrues to a person not under a disability and afterwards devolves on a person who is under a disability (c). It is to be observed that the extension in respect of a disability is for the same period whether the cause of action arises on a deed or a simple contract.

The commencement of the limitation period will sometimes be postponed in cases involving fraud and mistake. The Limitation Act, 1939 (d), declares that: "Where . . . either—

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person, or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it. . . ." A proviso protects the rights of *bona fide* purchasers for value. This enactment is a statutory adoption and extension of the equitable doctrine of "concealed fraud". The doctrine of equity did not include cases of mistake, and its contents and application were in some respects uncertain (e).

In respect of one kind of contractual obligation, *viz.*, debts, whether by specialty or simple contract, time, after it has commenced to run, may be made to start afresh by an acknowledgment of the debt or a payment in respect of it by the debtor. The Civil Procedure Act, 1833 (f), dealing with specialty debts, made specific provision as to this matter. No similar provision as to simple

(a) See pp. 479 *et seq.*, *ante*.

(b) S. 31 (2), Limitation Act, 1939. S. 31 (3) provides that in certain cases persons shall be conclusively presumed to be of unsound mind.

(c) S. 22, *ib.*

(d) S. 26.

(e) See Brunyate, *Limitation of Actions in Equity*, 23 ff.; Law Revision Committee's Report on Statutes of Limitation (Cmd. 5334) paras. 22 and 23; *Lynn v. Bamber*, [1930] 2 K. B. 72.

(f) S. 5.

rules of equity based on the same general policy as the statutory provisions. Recently this body of law was considered by the Law Revision Committee, and as a result of their labours (r) the earlier statutes have now been repealed and for them substituted the Limitation Act, 1939. This Act effected some valuable improvements in the law and settled a number of uncertain points. We shall consider first the law under the new statute, and secondly the special equitable rules as to the effect of lapse of time on a cause of action in contract.

Limitation Act, 1939. Subject to certain exceptions no action on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued in the case of a simple contract (s), or of twelve years from that date in the case of a deed (t). For the present purpose any claim by way of set-off or counter-claim is to be deemed a separate action commenced on the same date as the action in which the set-off or counter-claim is pleaded (u).

A cause of action accrues when all the facts have occurred which must be alleged and (unless admitted by the defendant) proved by the plaintiff if he is to succeed in his action (x). In actions based on breach of contract the cause of action is the breach (y), and not the actual damage (if any) resulting therefrom, for a breach of contract is actionable *per se* without proof of actual damage, nominal damages being recoverable in the absence of such proof. Even if resulting actual damage happens or is discovered after the occurrence of the breach it will not be a new cause of action but merely an incident of the old one (z). What in any particular case constitutes a breach of contract turns on a comparison of what was done or omitted with what on the true meaning and effect of the particular contract was at the relevant time required to be done or omitted. In other words the question turns on whether or not the defendant's acts or omissions fell short of the performance required of him by

(r) Report published as Cmd. 5334 (reprinted in [1937] W. N. p. 2).

(s) S. 2 (1), Limitation Act, 1939.

(t) S. 2 (3), *ib.* Under the Civil Procedure Act, 1833, the corresponding period was twenty years.

(u) S. 28, *ib.*

(x) *Coburn v. Colledge*, [1897] 1 Q. B. 702.

(y) As to the case of a debt payable on demand, however, see p. 480, *ante*.

(z) *Battley v. Faulkner* (1820), 3 B. & Ald. 288; 106 E. R. 668; *Howell v. Young* (1826), 5 B. & C. 259; 108 E. R. 97; Salmond, Torts (9th ed.), 179.

his contract. We have already sufficiently considered what conduct will constitute performance of a contract (a).

If, when the cause of action arises, the person to whom it accrues is an infant, or of unsound mind, or in certain cases a convict (b), the action may be brought before the expiration of six years from the date when the person ceases to be under the disability or dies, whichever event first occurs. No extension of time is allowed where the right of action first accrues to a person not under a disability and afterwards devolves on a person who is under a disability (c). It is to be observed that the extension in respect of a disability is for the same period whether the cause of action arises on a deed or a simple contract.

The commencement of the limitation period will sometimes be postponed in cases involving fraud and mistake. The Limitation Act, 1939 (d), declares that: "Where . . . either—

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person, or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it. . . ." A proviso protects the rights of *bona fide* purchasers for value. This enactment is a statutory adoption and extension of the equitable doctrine of "concealed fraud". The doctrine of equity did not include cases of mistake, and its contents and application were in some respects uncertain (e).

In respect of one kind of contractual obligation, *viz.*, debts, whether by specialty or simple contract, time, after it has commenced to run, may be made to start afresh by an acknowledgment of the debt or a payment in respect of it by the debtor. The Civil Procedure Act, 1833 (f), dealing with specialty debts, made specific provision as to this matter. No similar provision as to simple

(a) See pp. 479 *et seq.*, *ante*.

(b) S. 31 (2), Limitation Act, 1939. S. 31 (3) provides that in certain cases persons shall be conclusively presumed to be of unsound mind.

(c) S. 22, *ib.*

(d) S. 26.

(e) See Brunyate, *Limitation of Actions in Equity*, 23 ff.; Law Revision Committee's Report on Statutes of Limitation (Cmd. 5334) paras. 22 and 23; *Lynn v. Bamber*, [1930] 2 K. B. 72.

(f) S. 5.

contract debts was contained in the Limitation Act, 1623, but its place was taken by a body of Judge-made law to somewhat the same effect. Two main points of difference were first that an acknowledgment in respect of a simple contract debt had to amount to a promise to pay the debt (*g*), whereas no such promise needed to be expressed or implied in an acknowledgment under the Civil Procedure Act (*h*); and secondly that while an acknowledgment of a simple contract debt had to be to the creditor the acknowledgment of a specialty debt might be validly made to a third party (*i*). Whether an acknowledgment of a simple contract debt was to be regarded as establishing a new contractual obligation or reviving the old one was a vexed question. The latter view was preferred by Lord Sumner in a recent case in the House of Lords (*k*).

The differences in this matter between specialty and simple contract debts have now been removed and the law for both kinds of debts declared by the Limitation Act, 1939, in the following terms:

“Where any right of action has accrued to recover any debt or other liquidated pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment . . .” (*l*).

“Every . . . acknowledgment . . . shall be in writing and signed by the person making the acknowledgment.

Any . . . acknowledgment or payment . . . may be made by the agent of the [debtor] . . . and shall be made to the person, or to an agent of the person, whose . . . claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made” (*m*).

It will be observed that under these provisions an express or implied promise to pay is not necessary (*n*); and that the acknowledgment or part performance must be to the creditor or his agent. It seems that the acknowledgment or payment will be equally effective whether made before or after a period of limitation has already expired (*o*).

(*g*) See *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

(*h*) *Re Atlantic and Pacific Fibre and Importing Co.*, [1928] Ch. 836.

(*i*) *Ib.*

(*k*) *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

(*l*) S. 23 (4).

(*m*) S. 24.

(*n*) Cf. *Re Atlantic, etc., Co.*, [1928] Ch. 836.

(*o*) Cf. *Re Lord Clifden*, [1900] 1 Ch. 774.

The Limitation Act, 1939, does not extinguish the obligation but simply bars the remedies of action and set-off or counter-claim. If the obligee can make the obligation effective by some means other than these he may do so. Thus in the case of a statute-barred debt if the debtor should pay money to the creditor without appropriating it to any particular indebtedness the creditor may appropriate it to the statute-barred debt (p). Securities for statute-barred debts remain effective (q); and an executor may pay such debts whether owing to third parties (r) or himself (s) unless they have been declared by the Court to be statute-barred (t). A trustee may pay a debt which is statute-barred (u).

Equitable Rules. Neither the Limitation Act, 1623, nor the Civil Procedure Act, 1833, applied in terms to suits in equity arising out of contracts. It seems probable that in regard to suits for specific performance (x), injunction, and rescission for undue influence, innocent misrepresentation and fraud, equity would apply the Statutes of Limitation by analogy to the extent of regarding them as establishing (subject to equity's doctrine of concealed fraud) maximum limits of time within which the equitable remedy might be sought (y). Very often, however, the equitable doctrine of laches or acquiescence operated to bar a claim for such equitable relief long before even the six years period established by the Act of 1623 had elapsed (z).

Under the 1939 Act the position has not been changed. The Act expressly declares (a): "This section [section 1, which establishes the periods of limitation for actions on contracts] shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy

(p) *Mills v. Fowkes* (1839), 5 Bing. N. C. 455; 132 E. R. 1174.

(q) *Spears v. Hartley* (1800), 3 Esp. 81; 170 E. R. 545; *Higgins v. Scott* (1831), 2 B. & Ad. 413; 109 E. R. 1196; *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161.

(r) *Re Rowson* (1885), 29 Ch. D. 358.

(s) *Hill v. Walker* (1858), 4 K. & J. 166; 70 E. R. 69.

(t) *Midgely v. Midgely*, [1895] 3 Ch. 282.

(u) *Budgett v. Budgett*, [1895] 1 Ch. 202.

(x) *Firth v. Slingsby* (1888), 58 L. T. 481; cf. *Talmash v. Mugleston* (1826), 4 L. J. (o.s.) Ch. 200. It is not clear whether the whole point of the latter case was not one of pleading. See Brunyate, *Limitation of Actions in Equity*, 16.

(y) See Brunyate, *op. cit.*, 227-8.

(z) It need scarcely be added that the equitable doctrine of laches has no application to a common law claim for debt or damages. *Public Trustee v. Pearlberg*, [1940] 2 K. B. 1, 24.

(a) S. 2 (7).

in like manner as the corresponding enactment repealed by this Act has heretofore been applied". It is further provided that "Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise" (b).

What amounts to such delay as to induce a Court of equity to refuse its relief turns to a large extent on the circumstances of the particular case. Where specific performance is sought especial promptitude is necessary (c), unless the plaintiff is already in possession of the property under the contract (d). Similarly suits for rescission for undue influence (e), innocent and fraudulent misrepresentation (f) should be commenced promptly. Delay may also be fatal where a mandatory injunction is sought but is generally of less importance in a suit claiming merely a prohibitory injunction (g).

(b) S. 29.

(c) *Pollard v. Clayton* (1855), 1 K. & J. 462; 69 E. R. 540.

(d) *Shephard v. Walker* (1875), L. R. 20 Eq. 659.

(e) *Turner v. Collins* (1871), L. R. 7 Ch. 329, 341.

(f) *Peck v. Gurney* (1873), L. R. 6 H. L. 377, 384; see also p. 274, *ante*.

(g) Halsbury, *Laws of England* (2nd ed.), vol. 18, pp. 17-18, 26-27.

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